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In the Supreme Court of the United States

OCTOBER TERM, 1991

FEATHERLITE PRECAST CORPORATION,
PETITIONER

v.

JAMES C. PLEDGER, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS, and JIMMIE LOU FISHER LUMPKIN, Treasurer of the STATE OF ARKANSAS
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PARAGON PRINTING & STATIONERY COMPANY, INC.

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QUESTIONS PRESENTED

1. Whether Arkansas' Use Taxes were imposed in a discriminatory manner, in violation of the Commerce Clause, against an out-of-state located construction contractor (who performed part of the construction services by "precasting" all of the component parts of large concrete structures at its out-of-state location and then erected the entire structures on real property at Arkansas job sites), when the amount of Use Tax it incurred on these "lump sum" contracts was 400% greater than the amount of Sales Tax imposed upon similarly situated in-state located construction contractors (who poured the component parts of the large concrete structures in place at the Arkansas job sites)?

2. Whether Arkansas' Sales Taxes and Use Taxes were imposed, in violation of the Equal Protection Clause (in an amount that was 400% greater), against construction contractors who, under "lump sum" contracts, performed part of their construction services by precasting the component parts of large concrete structures "off-site" and then erected the entire concrete structures on real property at Arkansas job sites, as compared to similarly situated construction contractors who performed all of their construction services on these same concrete structures by pouring the component parts of the concrete structures in-place at the Arkansas job sites?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner Featherlite Precast Corporation is a corporation organized under the laws of the State of Texas. This corporation has no subsidiaries and is itself a wholly owned subsidiary of Justin Industries, Inc. Justin Industries, Inc. is a corporation organized under the laws of the State of Texas, and it is a publicly traded corporation sold in the over the counter market on NASDAQ listings. [1]

Respondent James C. Pledger is the duly appointed and currently serving Director of the Arkansas Department of Finance and Administration. He is the person who is charged by statute with administering the state and local Compensating (Use) Taxes and Gross Receipts (Sales) Taxes imposed in Arkansas. Jimmie Lou Fisher Lumpkin is the duly elected and serving Treasurer of the State of Arkansas.

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[1] Justin Industries, Inc. also operates the following wholly owned subsidiaries: Acme Brick Company (Del.); Alpha Cargo Motor Express, Inc. (Tex.); Acme Royalty Company (Del.); Justin Management Company (Del.); Featherlite Building Products, Inc. (Del.); Boot Royalty Company (Del.); Footwear Management Company (Del.); El Paso Leather Components, Inc. (Tex.); Tradewinds Technologies, Inc. (Del.); and Northland Publishing Company (Ariz.).

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RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Featherlite Precast Corporation respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS

The Opinion of the Supreme Court of Arkansas (App. B, *infra*, 2a) is reported at 308 Ark. 124, 823 S.W.2d 852. The Order of the Supreme Court of Arkansas denying the petition for rehearing is unreported (App. A, *infra*, 1a).

The Memorandum Opinion (App. C, *infra*, 16a) of Chancellor John C. Earl of the Pulaski County Chancery Court entered on December 31, 1990, is unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. B, *infra*, 2a) was rendered on January 27, 1992, and a Petition for Rehearing was timely filed by the Petitioner and denied on March 9, 1992 (App. A, *infra*, 1a). The jurisdiction of this Court is

invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, § 8, Cl. 3. Powers of Congress. The congress shall have power ...

[3] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Amendment 14, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Statutory Tax Scheme. Arkansas adopted a permanent Sales Tax in 1941 (Act 386 of 1941, Ark. Code Ann. § 26-52-101, *et. seq.*) and a Compensating (Use) Tax in 1949 (Act 487 of 1949, Ark. Code Ann. § 26-53-101, *et. seq.*). As with most states' statutory schemes of imposing Sales and Use Taxes, the Arkansas Use Tax is complementary to the Sales Tax and is written so as to cover purchases of tangible personal property from out-of-state sources, that are used, consumed or stored in Arkansas. All purchases or sales of tangible personal property are covered by these two excise taxes, unless a specific exemption applies. No services are subjected to the Use Tax, and only a few specifically enumerated services (which do not include construction or transportation services) are subjected to Arkansas' Sales Tax. Both the Sales Tax and Use Tax statutes specifically designate construction contractors as consumers of taxable property and services consumed in performing construction contracts, though these statutes do not require that such contractors be formally licensed by the Arkansas Contractor's Licensing Board.

Construction of Concrete Structures. Massive one-of-

a-kind concrete structures (e.g. parking decks, warehouses, bridges, etc.) that are architecturally designed and specifically engineered to be permanently attached to real property were constructed in Arkansas from raw materials (e.g. sand, gravel, cement, reinforcing steel, etc.) by three slightly different methods during the period in suit (i.e. 1981 through 1986). First, using the "poured-in-place" method, a general contractor or a specialty cement subcontractor would form the individual components of the overall structure by combining the raw building materials in specially built forms on the job site. When the cement cured, the form was removed, and another form would be built on top of that completed component of the concrete structure, and another component of the structure would be formed in the same manner. This process was repeated until the entire structure was completed. The use of this "poured-in-place" method takes a substantial amount of time to complete the entire structure, because each component part has to cure before additional forms can be built. (R. 269-270; 237-239) [2]

Second, using the "tilt-up" method of construction, the general contractor or specialty cement subcontractor would form certain component parts of the entire structure (e.g. a wall section) from raw materials in specially designed forms on the job site. When the component part was cured, it would be simply "tilted-up" into place. This "tilt-up" method of construction is substantially faster than the "poured-in-place" method. (R. 240-241A)

Third, using the "precast" or "prestressed" method of construction, a contractor would pour or fabricate the individual components of the entire concrete structure in an assembly line fashion from raw materials in specially designed forms at the precaster's plant (off of the job site), transport the component parts to the job site, and erect these components in a "tinker toy" fashion by attaching the components together to make a completed concrete structure attached to the real property. This "precast" method

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[2] The record in this case was completely stipulated by the parties. The Petitioner will use the designation "R" to refer to the part of the designated record where these facts are stipulated.

has the advantage of speed, since the components can be constructed into a completed structure on the job site in a matter of weeks, rather than months, as with the use of the "poured-in-place" method. (R. 265-266; 269-270; 229-236)

Under any of the three methods of construction, the portion of the entire cost of the concrete structure that was attributable to the cost of the raw materials (e.g. sand, gravel, cement, reinforcing steel, etc.) ran from 10% to 40% of the total price of the completed concrete structure, with an average of approximately 25% of the total cost of the completed concrete structure being attributable to the cost of the raw materials. The balance of the cost of the complete concrete structure was attributable to the cost of direct construction labor, general overhead, and profit for the contractor.

Petitioner's Construction Operations. During each of the years 1981 through 1986, though Featherlite Precast Corporation ("Featherlite") was headquartered in Austin, Texas, the company was formally qualified to conduct business as a foreign corporation in the State of Arkansas and it was licensed by the Arkansas Contractor's Licensing Board to engage in the construction of "heavy buildings" on Arkansas job sites. (R. 307; 309-315) Featherlite usually provided the oversight and erecting services on the actual Arkansas job sites, since the company found that the breakage claims that occurred in the assembling of the entire concrete structures were substantially lessened when it provided these on-site erection services. However, in a number of instances, Featherlite sold its completed one-of-a-kind concrete structures directly to large corporations or state or local government agencies who either erected the completed concrete structures on the Arkansas job sites themselves or contracted the work to other subcontractors. (R. 266; 217-219) [3]

Featherlite's primary business was the fabrication and erec-

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[3] This dispute, as to the correct taxable base for Arkansas Use Tax purposes, pertains only to factual situations where entire concrete structures were produced and erected on an Arkansas job site by Featherlite, as a subcontractor under a "lump sum" contract with a general construction contractor.

tion of large specially designed and engineered one–of–a–kind concrete structures on a "lump sum" contract basis throughout the south central region of the United States. Featherlite operated plants at various locations in Texas, Louisiana, and Tennessee, but it was the concrete structures fabricated by Featherlite at its Memphis, Tennessee, plant and erected on job sites in Arkansas that are specifically involved in the Use Tax audit dispute in this case. (R. 265–266; 290–305).

Featherlite's design, bidding and fabrication personnel worked closely with architects and engineers chosen by the property developer or the developer's general contractor in the designing of the complete concrete structures that would be precast and attached to real property at the Arkansas job sites. When the one–of–a–kind concrete structure's design was completed, Featherlite fabricated the entire structure by forming the individual parts or components on a somewhat assembly line basis at its Memphis plant in forms specially designed for each component's specifications. After passing plant inspection, Featherlite arranged for each component part to be moved to the Arkansas job site by an independent ICC licensed trucking firm (Featherlite owned no trucks of its own) and these "hauling charges" were separately stated on the Petitioner's invoices without Featherlite charging any "markup" for these "hauling charges." (R. 267, 269; 286–289) At the Arkansas job site, the individual components of the entire concrete structure were assembled "piece–by–piece" by Featherlite's employees into a completed concrete structure that was permanently attached to the real property. Title to the structure passed after erection, because Featherlite was responsible for any breakage during construction.

The parties stipulated that Featherlite's $1.89 million "lump sum" subcontract with a general construction contractor to supply a completed and erected eight (8) story precast parking deck in Little Rock, Arkansas, was illustrative of the type of obligations Featherlite had as a construction subcontractor on Arkansas job sites. (R. 200; 274; 291–296) This "standard" construction subcontract provided that the general contractor had previously agreed with the property's developer to furnish all labor and materials necessary for the complete construction of the parking deck, and –

> WHEREAS, that the PICKENS–BOND CONSTRUCTION CO. of Little Rock, Ark., hereinafter called PICKENS–BOND herein has sublet to the subcontractor [Featherlite], hereinafter named, the furnishing of all labor, material, insurance, taxes, equipment, supervision, permits, fees, etc., required for the following portion or subdivision of the erection and completion of said building, to wit:
>
> For Furnishing and Erecting Precast Concrete in accordance with plans and specifications prepared by Engineering Consultants, Inc.

Featherlite kept sufficient records at its Memphis, Tennessee, plant to specifically identify the amount and cost of raw materials it utilized in completing its various "lump–sum" contracts for the construction of concrete structures on actual Arkansas job sites. Though Featherlite entered into "lump sum" subcontracts with the primary general construction contractors to provide the entire concrete structure in place on the Arkansas job site, the company's invoices to its Arkansas customers separately stated the plant price, hauling charges and erection charges. [4] From the stipulated testimony of other precasters (with plants located both within and without the State of Arkansas), it was established that *all* precaster's operations were conducted in a similar fashion to Featherlite's. In fact, these other precasters all testified that they considered their competitors for contracts for the construction of large concrete structures to be the general contractor or specialty cement subcontractor who utilized the "poured–in–place" method to construct these large one–of–a–kind concrete structures on the Arkansas job sites. Neither Featherlite nor these other precasters made any sales of raw materials (e.g. building supplies) to the general contractors, and they did not produce or sell components

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[4] A notation appeared on each Featherlite invoice that a "part of the plant price" included the charge for Sales Tax or Use Tax that were applicable to the raw materials (i.e. tangible personal property) utilized in fabricating the entire concrete structure.

of these concrete structures as general inventoriable items. The fabrication of the components of each unique concrete structure was for the entire structure, not a portion of its parts (i.e. roof trusses, support columns, etc.). (R. 229–236; 268, 269)

On–site Contractor's Tax Reporting Method. Arkansas' statutory scheme of Sales and Use Taxes did not impose the 4% rates against the entire contract price (e.g. as do the laws of Mississippi and Washington). Arkansas' 4% rate was imposed only upon the construction contractor's purchase of items of tangible personal property and enumerated taxable services. Thus, the Arkansas DF&A stipulated that, during the period 1981–1986, the taxing agency required general construction contractors or specialty cement subcontractors who used the "poured–in–place" method of constructing cement structures to pay or remit Arkansas Sales Tax or Use Tax based only upon the value of the raw materials purchased for use in completing the contracts and that such contractors were not required to pay or remit Arkansas' Sales Tax or Use Tax upon the value of construction labor used or other service charges incurred. [5] This reporting requirement or treatment of general contractors was verified by the stipulated testimony of the representatives of two construction companies that constructed two concrete parking decks and a Federal Express warehouse/distribution center in Arkansas using the "poured–in–place" and "tilt–up" methods of construction. (R. 238–241A)

Petitioner's Tax Reporting Method. Featherlite filed monthly Consumer Use Tax Reports or Vendor Use Tax Reports

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[5] The exact wording of the stipulation on this point reads as follows (R. 196): 4. For purposes of administering Arkansas' Sales Tax and Compensating (Use) Tax laws, the Department of Finance and Administration requires that general contractors (or specialty subcontractors) who construct concrete structures on sites in Arkansas by pouring the component parts of the concrete structure "in place" to pay or remit Arkansas' Sales Tax or Compensating (Use) Tax upon the value of the raw materials (e.g. sand, gravel, cement, reinforcing steel, etc.) purchased for use in constructing such concrete structure. Such general contractors (or specialty subcontractors) are not required to pay or remit Arkansas' Sales Tax or Compensating (Use) Tax upon the value of labor used or other service charges incurred to construct these concrete structures in Arkansas.

with the Revenue Division of the DF&A, during the period from May 1, 1981, through December 31, 1986. On these monthly reports, Featherlite reported the entire gross proceeds realized from the charges it made to its Arkansas customers, but the charges attributable to hauling, shop labor, overhead, profit and erection services were subtracted, leaving the taxable base upon which the 4% Arkansas Use Tax rate applied to be only the cost of the raw materials (sand, gravel, cement, reinforcing steel, etc.) actually used by Featherlite to fabricate the large concrete structures it constructed and attached to real property at the Arkansas job sites. This same method of reporting the "taxable base" for Use Tax and Sales Tax reporting purposes was utilized by Featherlite in Texas, Louisiana, and Tennessee, where the company also conducted business, especially when Featherlite acted as a subcontractor under "lump sum" contracts to provide the erected concrete structures attached to real property at the job sites. (R. 195; 267–270; 280–285)

DF&A Audit and Litigating Position. The Use Tax Reports filed by Featherlite with the DF&A were audited, and the State of Arkansas took the legal position that the taxable base to which the 4% Use Tax rate should be applied was the entire "plant price" or "contract price" for the complete concrete structures delivered on Arkansas job sites, plus the "hauling charges." [6] The

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[6] The "plant price" was the entire "lump sum" contract price charged by Featherlite to its Arkansas customers, as a subcontractor, to provide the completed concrete structure erected on the Arkansas job site. DF&A, relying upon (1) its administrative interpretation of Arkansas' Sales Tax and Use Tax statutes and (2) the Arkansas Supreme Court's prior decision in *Republic Steel Corp. v. McCastlain*, 240 Ark. 979, 403 S.W.2d 90 (1966), treated Featherlite as selling tangible personal property (the completed components of the entire concrete structure) to itself, as a subcontractor that was erecting the components on the job site, so that the "plant price" included the cost of raw materials, direct shop labor, overhead and profit. Also, the "hauling charges" incurred for transporting the component parts of the concrete structure from Featherlite's Memphis, Tennessee, plant to the Arkansas job site, were included in the taxable base by DF&A. Only the actual erection charges were left out of the Use Tax base determined by DF&A on audit. The DF&A auditors gave Featherlite credit for the Use Taxes already paid on the cost of the raw materials used to fabricate the entire concrete structures, and a deficiency in Use Tax was proposed.

audit or litigating position adopted by the Arkansas DF&A in this case was not stated in any published Regulation or Revenue Policy Statement issued by the DF&A; it was simply the interpretive position of the statutory provisions adopted by the tax administrator as an "administrative practice," based upon the Arkansas Supreme Court's prior decision in the *Republic Steel Corp.* case. As a result of this unpublished "administrative practice," and because the raw materials (i.e. tangible personal property) used to fabricate the entire concrete structures represented only about 25% of the "plant price," the trial court found that there was a 2% to 3% difference in the cost of an entire concrete structure, if it was "precast" or if it was "poured-in-place," based solely upon the DF&A's "administrative practice." (App. C, pp. 34a-35a; R. 195-197; 269-272) [7]

Legislative Action. While the DF&A's audit findings were being disputed by Featherlite on the administrative level, the Arkansas General Assembly adopted Act 1068 of 1985 (App. D) to specifically provide that factory built manufactured homes would not be subject to Arkansas' Sales Tax or Use Tax on the total sales price, if the raw materials purchased for use in these factory built homes had been bought on a Sales Tax or Use Tax paid basis. Thus, the Arkansas General Assembly placed the builder of a factory built home and an on-site home contractor on the same competitive plane for Sales Tax and Use Tax purposes. In the regular session of the 1987 Arkansas General Assembly, both houses of the Arkansas General Assembly passed House Bill 1716 of 1987 (App. E), which Bill would have amended Act 1068 of 1985 to clarify the Sales Tax and Use Tax statutes to provide that the Arkansas Legislature intended that exactly the same treat-

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[7] The testimony of the Manager of the Sales and Use Tax Section of the Arkansas DF&A (R. 425-428) indicates that the State of Arkansas would treat a general contractor and a specialty cement subcontractor differently, where both used the "tilt-up" method of construction on the Arkansas job site. If the general contractor used the "tilt-up" method, the Sales Tax or Use Tax would be applicable only to the cost of the raw materials, but, if a specialty cement contractor used the "tilt-up" method, the Sales Tax or Use Tax would be applicable to the entire amount charged by the subcontractor (including cost of raw materials, direct labor, overhead and profit).

ment would be accorded to precasters of entire large concrete structures. H.B. 1716 of 1987 was vetoed by Governor Clinton, and did not become law. (R. 199–200; 242–249)

Judicial Review. Following Governor Clinton's veto of H.B. 1716 of 1987, the Administrative Law Judge approved the DF&A's interpretive audit position and Featherlite was assessed a deficiency of $143,288.54 in Use Tax, plus $52,555.87 in interest. This amount was paid, "under protest," by Featherlite and a timely suit for refund was filed in the Pulaski County Chancery Court, wherein the Petitioner alleged in its Complaint that its rights under both the Commerce Clause and the Equal Protection Clause of the federal constitution had been violated by the DF&A's administrative practice applied in this case. (R. 38–40) The evidentiary record was fully stipulated by the parties in the trial court. This record included a standard "lump sum" construction subcontract entered into by Featherlite with a general contractor for the construction of an entire eight story parking deck on an Arkansas job site; the affidavit testimony of representatives of precasters (with plants located within and without the State of Arkansas), the affidavit testimony of representatives of general contractors (located both within and without the State of Arkansas) that utilized the "poured-in-place" and "tilt-up" methods for constructing large concrete structures (including two municipally owned parking decks and a warehouse/distribution center located in Little Rock, Arkansas); and photographic representations of all of these completed concrete structures.

The Chancellor in the trial court entered a Memorandum Opinion (App. C, 16a–43a) which contained extensive findings of fact and conclusions of law.[8] The Chancellor held for Featherlite on its statutory interpretation of the Arkansas General Assembly's intent, and also for the corporate taxpayer on its Commerce Clause and Equal Protection Clause based challenges. The Director of

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[8] Though the trial court chancellor certified this suit as a class action, under a state constitutional provision, this class certification was overturned by the Arkansas Supreme Court's decision. The state court's denial of class action status in this suit has not been made a subject of this Petition for Certiorari.

DF&A appealed to the Arkansas Supreme Court. The Arkansas Supreme Court rendered an opinion (App. B, 2a–15a) reversing the trial court and entirely sustaining the DF&A's interpretive position and "administrative practice." The Arkansas Supreme Court held, based upon its prior precedent in *Republic Steel Corporation, supra*, that Featherlite (as a fabricator) had made a "deemed" sale to itself (as a subcontractor) of the separate components (i.e. tangible personal property) of the concrete structures *before* the separate components of the entire concrete structure were attached to real property in Arkansas. Therefore, the Revenue Division's interpretation of the statutes was held to be correct, because the Petitioner was deemed to have sold tangible personal property to itself. Also, the Arkansas Supreme Court denied the validity of Featherlite's Commerce Clause and Equal Protection Clause based challenges to this assessment. Featherlite's Petition for Rehearing was denied (App. A, 1a) and this Petition for Certiorari was then timely filed.

REASONS FOR GRANTING THE PETITION

The Petitioner submits that the two questions presented in this case establish that there are direct conflicts between the opinion below by the Arkansas Supreme Court and prior opinions of this Court (*Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1973)) and other state appellate courts (*Chicago Bridge & Iron Co. v. Cocreham*, 317 So. 2d 605 (La., 1975)) regarding how similarly situated construction contractors are to be treated for state Sales Tax and Use Tax purposes, when one contractor fabricates a part of the structure at its out–of–state plant and the other contractor constructs the structure entirely on the in–state job site itself. The Petitioner submits that the Arkansas Supreme Court's reversal of the trial court's well reasoned opinion on both the Commerce Clause and Equal Protection Clause based challenges constitutes clear error on an important issue already settled by this Court's decisions. The direct conflict presented by the decision by this state supreme court with prior decisions of this Court and the highest appellate courts of Arkansas' sister states on these important federal questions presents sufficient reason, as described by Rule 10.1(b) and (c) of this Court's Rules, to warrant the granting of the Petitioner's Writ in this case. The federal constitutional

issues presented here could be applicable in all states where only the cost of raw materials (i.e. tangible personal property) by a construction contractor is subjected to the states' Sales Taxes or Use Taxes. This Court's failure to reverse this Arkansas decision, under its general supervisory powers, could clearly encourage other states (in an attempt to maximize their respective Sales Tax and Use Tax revenue collections) to also stray from this Court's prior determinations of the controlling law and, thus, unconstitutionally interfere with construction contractors engaged in interstate commerce.

The Arkansas Supreme Court's creation of "a legal abstraction" in its "fictional sale" theory has resulted in the state court refusing to recognize Featherlite as a construction contractor, for purposes of determining the company's Use Tax base. Instead, the state court has treated the Petitioner as a mere materialman furnishing building supplies to itself. This interpretation has resulted in an inclusion in the Petitioner's Use Tax base of all of its costs of direct labor and overhead, plus its profit, plus the costs for the separately provided transportation services. It is undisputed and stipulated by the Respondents that a similarly situated construction contractor who utilizes the "poured-in-place" method of constructing large concrete structures in Arkansas has a Use Tax or Sales Tax base comprised of only the cost of the raw materials purchased to build the concrete structure. The Arkansas DF&A's "administrative practice" (which has been confirmed by the Arkansas Supreme Court in this case) has resulted in the determination of a Use Tax base for Featherlite that is 400% greater than the Sales Tax or Use Tax base of its similarly situated on-site construction contractor competitors that use the "poured-in-place" or "tilt-up" method of constructing the same large concrete structures. The Arkansas Supreme Court's decision did not measure the competition between these similarly situated taxpayers in terms of dollars and cents, but, instead, relied upon a legal abstraction that has resulted in a discriminatory and unconstitutional imposition of Arkansas' Use Taxes against this out-of-state located construction contractor that uses the "precast" method of construction. This decision by the Arkansas Supreme Court should be reversed by this Court to protect the integrity of its prior decisions.

I.

THE DECISION BELOW VIOLATES THE PROVISIONS OF THE COMMERCE CLAUSE BY IMPOSING A SUBSTANTIALLY GREATER USE TAX UPON AN OUT-OF-STATE BASED CONSTRUCTION CONTRACTOR THAT USES THE "PRECAST" METHOD OF CONSTRUCTING CONCRETE STRUCTURES, AS OPPOSED TO THE SALES TAX IMPOSED UPON THE SIMILARLY SITUATED "IN-STATE" LOCATED CONSTRUCTION CONTRACTORS WHO USE THE "POURED-IN-PLACE" METHOD OF CONSTRUCTING THE SAME UNIQUE, ONE-OF-A-KIND CONCRETE STRUCTURES ON REAL PROPERTY IN ARKANSAS.

Equality of Taxation. This Court has many times upheld states' statutory schemes for imposing Sales Taxes and Use Taxes, where the transactions are taxed only once, and the Use Tax is designed to complement the Sales Tax, so as to protect the retail merchants of the state against unfair competition from out-of-state sellers. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). The purpose of such a statutory scheme is to make all tangible personal property used or consumed in a state subject to a uniform tax burden irrespective of whether it is acquired within the state or from without the state. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). However, if a state's Use Tax is discriminatorily imposed upon an out-of-state located party engaged in interstate commerce, as compared to the Sales Tax treatment of that party's similarly situated competitor who is located within the state, then this Court has continually declared that such discriminatory imposition of a state's Use Tax against one engaged in interstate commerce violates the provisions of the Commerce Clause (Art. 1 § 8, Cls. 3) of the United States Constitution. *Halliburton Oil Well Cementing Co.*, *supra*, and *Complete Auto Transit Co. v. Brady*, 430 U.S. 247 (1977). It makes no difference whether the statutory scheme discriminates upon the face of the statutes them-

selves [9] or from the "practical effect" of the administrative imposition of these taxes in their "actuality of operation." [10]

The Petitioner submits that the factual situation presented in this case is virtually indistinguishable from that presented to this Court in *Halliburton, supra*, where the Court ruled in favor of the challenging taxpayer. As in the *Halliburton* case, the challenge here is not to a statutory provision, but to the taxing authority's "administrative practice." The problem in this case is that the state taxing authority and the state supreme court have chosen to make an artificial and improper comparison of similarly situated taxpayers, to the extreme detriment of Featherlite and all other contractors who utilize the "precast" method of construction. This classification by the taxing administrator has resulted in a Use Tax being imposed upon the out-of-state based construction contractor (Featherlite), that used the "precast" method of construction, in an amount that is 400% greater than the Sales Tax that would be imposed upon an in-state located construction contractor who builds exactly the same massive one-of-a-kind concrete structures on real property in Arkansas by either the "poured-in-place" or "tilt-up" methods of construction. Both the DF&A and the Arkansas Supreme Court have refused to compare the Sales Tax and Use Tax effect upon similarly situated construction contractors, but instead have chosen to employ a "legal fiction" that treats Featherlite as a mere retail supplier or materialman (solely because the Petitioner utilizes the "precast" method of construction) that sells to itself. The net effect of the DF&A's administrative practice is to place this out-of-state based construction contractor at a

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[9] See, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); *Tyler Pipe Industries, Inc. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Western Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); and *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977).

[10] See, *ATA, Inc. v. Scheiner*, 483 U.S. 266 (1987); *Nippert v. City of Richmond*, 327 U.S. 416 (1946); and *Best & Co. v. Maxwell*, 311 U.S. 454 (1940).

substantial competitive pricing disadvantage (e.g. 2% to 3% of the entire contract price), when compared to its in-state located construction contractor competitors (whether they are general contractors or specialty cement subcontractors) who utilize the "poured-in-place" or "tilt-up" methods for constructing the same massive concrete structures (e.g. parking deck, bridge, warehouse, etc.) on real property at job sites located in Arkansas.

In *Halliburton*, this Court clearly stated (373 U.S. at 70) -

> The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is a condition precedent for a valid use tax on goods imported from out-of-state.
>
> * * *
>
> [E]quality for the purpose of competition and the flow of commerce is measured in dollars and cents, not legal abstractions.

Featherlite submits that the Arkansas Supreme Court gave only lip service to this Court's above-quoted admonition in its opinion (App. B, p. 10a-11a). The Arkansas court did not properly apply this controlling standard, because of that court's interpretation of this standard in its prior decision in *Republic Steel Corporation v. McCastlain*, 240 Ark. 979, 403 S.W.2d 90 (1966). In the *Republic Steel* case the Arkansas court erroneously developed a "fictional sale" theory whereby a contractor was deemed to have sold tangible personal property to itself, so as to place similarly situated construction contractors on an even competitive plane for Sales Tax and Use Tax purposes. [11] Therefore, the court below held

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[11] In the *Republic Steel Corp.* case, Republic Steel was a subcontractor on construction sites at missile silos in Arkansas and it had contracted to fabricate steel reinforcing rods for the pouring of the cement missile silos. Since Republic Steel manufactured reinforcing rods at its plant in Illinois, it simply withdrew sufficient amounts of reinforcing rods from its stockpile of inventoried materials in Illinois and utilized those reinforcing rods as raw materials in performing its subcontract to fabricate the reinforcing steel for the missile silos in Arkansas. All of the actual fabrication work was performed by Republic Steel on the Arkansas job sites. Republic Steel reported Use Tax to Arkansas based upon the value of the raw materials it consumed in manufacturing the reinforcing rods at its Illinois

that Featherlite, as a precaster, was deemed to have sold the individual component parts of the large concrete structures to itself, as the on-site subcontractor, at the fair market value (entire contract price) of these components at the time of their delivery to the Arkansas job sites and before they were permanently attached to the real property. [12]

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plant. The Arkansas DF&A, sustained by the Arkansas Supreme Court, took the "administrative position" that, to meet the requirements of equal treatment of both in-state and out-of-state contractors, as decreed by this Court in its *Halliburton* decision, Republic Steel had to report the value of the reinforcing rods for Arkansas Use Tax purposes at the fair market value of the "finished product," not simply the cost of the raw materials the company used to make the steel rods.

Though the result of this decision in *Republic Steel* is correct, because the steel reinforcing rods were generally available inventoriable items of tangible personal property that would be "raw materials" for any steel fabricating contractor working on the missile silos in Arkansas, the Arkansas Supreme Court unfortunately developed a theory where it deemed that there was a "fictional sale" by Republic Steel (as a manufacturer) to itself (as a construction contractor) at the fair market value of the "finished product," not the raw materials used to make the item in question. Petitioner submits that, instead of a sale, Republic Steel merely made a withdrawal from its stock, which withdrawal would now be covered by the provisions of Ark. Code Ann. § 26-53-102(5), to reach the same result.

However, based upon its *Republic Steel* precedent, the Arkansas Supreme Court felt constrained to rule in this case that a construction contractor who performs part of the construction labor off the actual job site must report Use Tax based upon the fair market value of the "finished product," i.e. the individual components of the entire concrete structure (tangible personal property) when they were delivered to the Arkansas job site (as opposed to the cost of the raw materials utilized in the fabrication of the components of this large concrete structure). Featherlite submits that this decision by the Arkansas court is clearly erroneous, it represents an application of "form over substance," and the court compounds its previous error (i.e. "legal abstraction") by saying that there was a "fictional sale" or transfer of ownership of the component parts of these concrete structures by Featherlite to itself.

[12] This "fictional sale" theory created by the Arkansas Supreme Court in its *Republic Steel* case is a "legal abstraction" that has been severely criticized by appellate courts of Arkansas' sister states that have held that the proper measure of the Use Tax base for an "on-site" construction contractor, who also fabricates part or all of the permanent structure at its out-of-state "off-site" location, is the cost of the raw materials used to build the structure, the same as the construction

Legislative Intent Controls. As in the *Halliburton* case, the issues presented here are based solely upon the state taxing authorities' literal interpretation and "administrative practice" in implementing the static provisions of Arkansas' Sales Tax and Use Tax statutes to an ever evolving technological advance in methods of construction. Thus, the Petitioner's challenge here is to the taxing authority's "administrative practice" for implementing Arkansas' Sales Tax and Use Tax statutes, *not* to any specific legislative enactment by Arkansas' General Assembly. [13]

The Arkansas trial court acknowledged that Featherlite was acting *only* as a construction contractor in fulfilling its contractual obligations to supply fully erected concrete structures on real property at Arkansas job sites, and that it did not make any difference where this contractor performed its construction or fabrication services. [14] The Arkansas Supreme Court, in reversing the

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contractor who performs *all* of the construction services on the in-state job site. See, *Hawes v. Ingalls Iron Works Co.*, 159 S.E.2d 434 (Ct. App. 1st. Div. Ga., 1968); and *Rocky Mountain Prestress, Inc. v. Johnson*, 574 P.2d 88 (Colo., 1978).

[13] This Court has long held that an "administrative practice" adopted by an administrative agency to implement an otherwise constitutional statute can, of itself, violate the constitutional rights of the complaining taxpayer-citizens. See, *Allegheny-Pittsburgh Coal Co. v. County Comm.*, 488 U.S. 336 (1989); *Greene v. Louisville & Interurban R.R. Co.*, 244 U.S. 499, 507 (1917); *Johnson v. Wells Fargo & Company*, 239 U.S. 234, 242 (1915); *Raymond v. Chicago Traction Co.*, 207 U.S. 20 (1907); and *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 390 (1894).

[14] The trial court did note that Featherlite was performing construction services as a contractor, not acting as a materialman in selling basic building supplies. Further, the trial court noted that, as a contractor, Featherlite was statutorily presumed to be the consumer (for Sales Tax and Use Tax purposes) of the raw materials purchased for use in constructing the entire concrete structure. Finally, the trial court acknowledged that the Arkansas General Assembly had enacted Act 1068 of 1985 (App. D) (Ark. Code Ann. § § 26-52-801, 802, 803 and 804; and Ark. Code Ann. § 26-53-118) to indicate that it intended to tax the manufacturers of factory built homes (for Sales Tax and Use Tax purposes) in the same manner these laws taxed on-site contractors. In 1987, both houses of the Arkansas Legislature passed House Bill 1716 of 1987 (App. E) to clarify that it intended for contractors who used the "precast" method of constructing large

trial court, refused to look at the entire statutory scheme of Sales Taxes and Use Taxes, and therefore refused to find that there was any question or ambiguity in the wording or application of these Sales Tax or Use Tax statutes, or any need to apply rules of statutory interpretation to them. The Arkansas court held that, under the clear wording of the controlling statutes, Featherlite was the vendor producer-seller of the component parts (tangible personal property) of the entire concrete structure, the value of which had been greatly enhanced by the construction labor performed at the company's out-of-state plant before it was brought to the Arkansas job site. The state court held that its reading of the Sales Tax and Use Tax statutes treated *all* precasters alike (whether their plants were located within or without the State of Arkansas), and, therefore, there could be no violation of the Commerce Clause of the United States Constitution; because parties engaged in interstate commerce were not being discriminated against in the imposition of Arkansas' Sales Taxes and Use Taxes.

Featherlite maintains that this interpretation of Arkansas' statutory scheme of Sales Taxes and Use Taxes by the Arkansas court is too myopic, because it ignores the Arkansas Legislature's clear intent, in both the Sales and Use Tax statutes, to have all construction contractors treated as consumers of the raw materials purchased by them for use in their building of permanent structures on real property in Arkansas and that all similarly situated construction contractors should be treated equally. (Ark. Code Ann. § § 26-52-103(9) and 307 (Sales Tax), and Ark. Code Ann. § § 26-53-201 and 203(a)(1) (Use Tax)) The Arkansas court's decision in this case does not create a level competitive tax plane for all similarly situated construction contractors. Instead, it creates a substantial competitive advantage for construction contractors who perform all of their activities "within Arkansas" at the job site. Featherlite submits that there is absolutely no logical

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concrete structures to be treated (for Sales Tax and Use Tax purposes) in the same manner as contractors who used the "poured-in-place" method of construction. The only thing that kept this legislative action from becoming law was the veto of Governor Clinton (the head of Arkansas' Executive Department, whose DF&A subdivision had adopted the "administrative practice" challenged by the Petitioner in this case).

basis for this result or that this result was what the Arkansas Legislature intended, when it enacted Arkansas' Use Tax in 1949.

As noted by the Louisiana Supreme Court in its *Chicago Bridge & Iron Co.* case, *supra* (where the factual situation presented was virtually indistinguishable from the one on the instant case) "taxes are imposed by the Legislature, not the Department of Revenue." (317 S.2d at 612). By approving the "legal abstraction" used by the DF&A as the basis for its "administrative practice" (that has resulted in a 400% greater Use Tax burden being imposed upon Featherlite, as compared to the Sales Tax burden carried by its "on-site" competitors), the Arkansas court has approved a policy that will exert "inexorable hydraulic pressure" upon, and will "foreclose tax-neutral decisions" by, property developers to choose the "poured-in-place" method of constructing concrete structures on-site by local construction contractors over the out-of-state located precaster, solely because of the pricing differential of the Use Tax in this highly competitive and price sensitive business. This Court's decisions have consistently struck down such practices based on their "practical effect." *ATA, Inc. v. Scheiner*, 483 U.S. at 286; *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 331; *Nippert v. City of Richmond*, 327 U.S. 417-418; and *Best & Co. v. Maxwell*, 311 U.S. 455-456.

Featherlite submits that the "administrative practice" adopted by DF&A that is challenged here should likewise be held violative of the Commerce Clause, especially since it does not reflect the state legislature's intent to treat all construction contractors equally as the consumers of the raw materials used by them to build the concrete structures in question.

Conflicts With Decisions In Other States. Though cited by Featherlite as authority and support for its Use Tax reporting positions in Arkansas, the Arkansas Supreme Court never distinguished (nor even discussed) the decision of the Supreme Court of Louisiana in *Chicago Bridge & Iron v. Cocreham*, 317 So. 2d 605 (La., 1975). Featherlite submits there is a reconcilable conflict between the decision in this case and the decision by the Louisiana Supreme Court in the *Chicago Bridge & Iron Co.* case on this Commerce Clause issue. In the Louisiana case, Chicago Bridge &

Iron ("CB&I") was a construction contractor that had contracted to build large oil field storage tanks in Louisiana. CB&I performed part of the construction services at its plant in Illinois by fabricating raw materials (i.e. steel plates) into specially designed components of the entire storage tank. These components were then transported by rail car from CB&I's Illinois plant to the Louisiana job site, where the balance of the construction services were rendered by CB&I's employees in assembling the large storage tanks into their completed form and permanently attaching them to the real property at the job site. The Louisiana tax administrator adopted an "administrative practice" that attempted to impose Louisiana's Use Tax based upon the total contract price charged by CB&I, plus the transportation charges. Thus, the facts in this *Chicago Bridge & Iron* case are virtually identical with and indistinguishable from those that were presented to the Arkansas Supreme Court in this case.

The Louisiana Supreme Court found that a strict and literal interpretation of the Louisiana Sales Tax and Use Tax statutes (which statutes are worded virtually the same as Arkansas' Sales Tax and Use Tax statutes) could cause a Use Tax to be imposed upon the entire contract price, plus the transportation charges, charged by CB&I. However, based upon the rationale of this Court's decision in *Halliburton*, the Louisiana court specifically found that the tax administrator's interpretation would violate the provisions of the Commerce Clause. That court determined that the "administrative practice" would impose the Use Tax upon a tax base that included the cost of labor, overhead and transportation for the out-of-state based contractor, which costs were not to be included in the Sales Tax base of similarly situated Louisiana based contractors who would have constructed the oil field storage tanks either on-site or at a Louisiana plant and then moved the components of these tanks on-site for final assembly. Thus, the Louisiana Supreme Court held that, under the overriding requirement of the Commerce Clause for equal application of the state's Sales Tax and Use Tax laws, the construction contractor with the out-of-state located plant would have to be taxed only upon the value of the raw materials it utilized in constructing the large oil field tanks that were permanently attached to real property in Louisiana, the same way that a Louisiana based contractor would

have been taxed for Louisiana Sales Tax purposes. [15]

The Petitioner submits that it is significant that there is no other reported decision (of this Court or of the appellate courts of Arkansas' sister states) that has upheld a tax administrator's "administrative practice" of imposing Sales Tax or Use Taxes where such practice imposed a 400% greater excise tax burden upon some, but not all, similarly situated construction contractors. Featherlite submits that the states of Texas, Louisiana and Tennessee (where it also had plants) all recognize the similarity of its newer "precast" method for constructing one-of-a-kind concrete structures with the more traditional "poured-in-place"

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[15] For other decisions of state courts that, in applying this Court's *Halliburton* rationale (or in criticizing the rationale of Arkansas' *Republic Steel* decision), held that contractors who performed part of their fabrication services off the job site must be taxed only upon the cost of the raw materials used in the permanent structures (not upon the value of direct labor or transportation), see *Alabama Precast Products, Inc. v. Boswell*, 357 So. 2d 985 (Ala., 1978); *Hawes v. Ingalls Iron Works Co.*, 159 S.E.2d 434 (Ct. App. 1st. Div. Ga., 1968); *Rocky Mountain Prestress, Inc. v. Johnson*, 534 P.2d 88 (Colo., 1978); *Chicago Bridge & Iron Co. v. Johnson*, 119 P.2d 945 (Cal., 1941); *Dow Chemical Company v. Triangle*, 336 So. 2d 285 (Ct. App. La., 1976); and *Pensacola Construction Co. v. McNamara*, 558 So.2d 231 (La., 1990). These cases held that the correct measure of the taxable base for both Sales or Use Tax purposes was the cost of *only* the raw materials utilized by the construction contractor, and not the cost of direct labor, overhead, profit or transportation. The DF&A's imposition of Use Tax here is especially onerous, because Featherlite reported (for Use Tax purposes) the cost of the raw materials "as delivered" to its Memphis, Tennessee, plant site (which charges would have included "transportation charges" that an on-site contractor in Arkansas would have paid for the same type of "delivered" raw materials). The "hauling charges" questioned by DF&A were incurred after all of the fabrication (construction) services had been rendered by Featherlite's employees, and Petitioner submits that the cost of moving the completed components to the Arkansas job site must be considered part of the "installation charges," which charges the Arkansas Legislature has specifically excluded by statute (Ark. Code Ann. § 26-53-102(1)) from the Use Tax base. Similarly, the Arkansas Legislature has *not* included "transportation services" as taxable services for Sales Tax purposes. Ark. Code Ann. § 26-52-301(3). Finally, the clear intent of the Arkansas Legislature was disregarded here, because, in defining the term "sale" for Arkansas Sales Tax purposes, the Legislature has specifically stated " 'Sale' shall not include the furnishing or rendering of services, except as otherwise provided in this section." (Ark. Code Ann. § 26-52-103(a)(3)(E)).

method, and that these states impose their Sales Taxes and Use Taxes upon only the cost of the raw materials used to produce the entire concrete structure, when the "precaster" is the subcontractor who erects the structure by permanently attaching the concrete structure to the real property on the job site. [16]

Therefore, Featherlite submits that the Court should grant its Petition and reverse the decision of the Arkansas Supreme Court in this case, because that court has refused to follow this Court's admonition in its *Halliburton* decision that similarly situated competitors must be treated equally for Sales Tax and Use Tax purposes and that this "equality for the purposes of competition and the flow of commerce is to be measured in dollars and cents, not legal abstractions." The Petitioner submits that the competitive disadvantage to which it has been put in this case is a direct result of the Arkansas Supreme Court's creation of a "legal abstraction" in holding that there was a "fictional sale" by a contractor to itself in its *Republic Steel Corp.* case, which decision directly conflicts with this Court's prior decision in *Halliburton*, and, therefore, cannot be allowed to stand. [17]

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[16] See, Tenn. Code Ann. § 67–6–209(a) (Tennessee); Comptroller of Public Accounts Limited Sales and Use Tax Rule 3.291 (Texas); *Chicago Bridge & Iron v. Cocreham, supra*, and *Pensacola Construction Co. v. McNamara, supra* (Louisiana). See also, Dept. of Revenue Sales and Use Tax Rules B27–011, B27–012, and B27–081 (Alabama); and Board of Equalization Sales and Use Tax Regulation 152 (California).

[17] The Petitioner maintains (as alleged in its Complaint, R. 41) that it is also entitled to recover all of its litigation costs, including attorneys' fees, pursuant to the provisions of 42 U.S.C. § § 1983 and 1988, because the "administrative practice" of the DF&A's imposing of Arkansas' Use Tax in such a discriminatory manner in this case has unconstitutionally violated the Petitioner's civil rights. See, *Dennis v. Higgins*, 111 S. Ct. 865 (1991).

II.

THE TAXING AUTHORITIES' ADMINISTRATIVE PRACTICE OF CLASSIFYING CONSTRUCTION CONTRACTORS WHO UTILIZE THE "PRECAST" METHOD OF CONSTRUCTION DIFFERENTLY THAN CONSTRUCTION CONTRACTORS WHO UTILIZE THE "POURED-IN-PLACE" OR "TILT-UP" METHODS OF CONSTRUCTION, FOR SALES TAX AND USE TAX PURPOSES, VIOLATES THE "PRECASTER'S" RIGHTS TO ENJOY THE EQUAL PROTECTION OF THE LAWS, BECAUSE (1) THERE IS NO LEGITIMATE STATE PURPOSE SERVED BY SUCH CLASSIFICATION, AND (2) THERE IS NO RATIONAL BASIS FOR THE DISCRIMINATORY CLASSIFICATION BY THE TAXING ADMINISTRATOR.

As noted in Argument I, the classification challenged by the Petitioner is not based upon any action taken by the Arkansas General Assembly in creating different classes of taxpayers for Sales Tax and Use Tax purposes. Instead, the Arkansas Legislature has specifically acted to classify *all* construction contractors as the consumers of the raw materials purchased by them for use in performing their construction contracts in making permanent improvements on real property in Arkansas. Ark. Code Ann. § § 26-52-103(9); and 307 and Ark. Code Ann. § § 26-53-201 and 203(a)(1). Instead, the challenged and discriminatory classification of the similarly situated contractor-competitors (that is at issue in this case) is based strictly upon the arbitrary and illogical classifications of construction contractors who use the "precast" method of construction and those that use the "poured-in-place" or "tilt-up" methods of construction that has been drawn by the Arkansas taxing authorities' "administrative practice."

The Petitioner submits that if the Court finds that there is no violation of the Commerce Clause here, because the DF&A's "administrative practice" treats all contractors utilizing the "precast" method of construction (whether their plants are located within or without the State of Arkansas) the same for Arkansas Sales Tax and Use Tax purposes, the Petitioner submits that this "administra-

tive practice" clearly violates its constitutionally guaranteed right to equal protection (under the provisions of the Fourteenth Amendment to the United States Constitution). The Petitioner submits that the substantially greater (in excess of 400%) difference that results for Sales Tax and Use Tax purposes because of the DF&A's "administrative practice" of making a different classification between the similarly situated construction contractors who build massive, one-of-a-kind specially designed and engineered permanent concrete structures on real property in Arkansas, cannot be justified under the Fourteenth Amendment's Equal Protection Clause.

Equal Protection Clause Standards. The Petitioner acknowledges that this Court's previous decisions have long ago established that the Court will give great deference and wide latitude to a state legislature's decisions to create different classifications of taxpayers to meet local economic and regulatory needs (in light of a taxpayer's Equal Protection Clause based challenge to a state tax). These classifications will be presumed constitutional and approved if the legislative action advances a legitimate state purpose and the resulting classifications are reasonably related to that state purpose; the classifications do not have to be drawn with mathematical precision; and, finally, a heavy burden of proof is placed upon the challenging taxpayer to establish that the questioned classifications are palpably arbitrary and do not advance a legitimate state purpose. See, *Allegheny Pittsburgh Coal Co. v. County Commissioner*, 488 U.S. 336 (1989); *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Madden v. Kentucky*, 309 U.S. 83 (1940); and *Carmichael v. Southern Coal Co.*, 301 U.S. 532 (1937).

However, the Petitioner submits that these same standards and presumptions will *not* necessarily apply when the classification between similarly situated taxpayers is drawn not by legislative action, but solely by the "administrative practice" of the taxing authority in implementing the tax statutes. Therefore, the arbitrary distinction that the DF&A's "administrative practice" has drawn between construction contractors who use the "precast" method of construction and similarly situated construction contractors who

utilize the "poured-in-place" or "tilt-up" methods of construction, (which classifications have resulted in the imposition of a Sales Tax or Use Tax burden on contractors utilizing the "precast" method of construction that is 400% greater than that imposed upon the similarly situated construction contractor who performs all of his activities "on site") is *not* entitled to these same presumptions, as would an act of the legislature in drawing similar classifications.

Featherlite submits that though an Equal Protection Clause based challenge to a state tax is probably the hardest constitutional issue for a challenging taxpayer to win, there are still "objective" standards that have been set by this Court that the challenged "administrative practice" must meet, under the "rational basis" or "minimum scrutiny" test employed in Equal Protection Clause cases, before it can be upheld. To pass constitutional muster, the classification must be reasonable, not arbitrary; it must rest upon some ground of difference having some fair and substantial relation to the object or purpose of the legislation; the classification cannot be palpably arbitrary, feigned or illusory; and the ultimate controlling issue is whether all taxpayers that are within the classification that is created are treated alike. *Allegheny-Pittsburgh Coal Co. v. County Commission, supra,* 109 S. Ct. at 638-639; *Allied Stores of Ohio, supra*, 358 U.S. at 527; *Walter v. City of St. Louis*, 347 U.S. 231, 237 (1954); and *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

The Petitioner submits that the discriminatory classification established by the DF&A's "administrative practice" in this case is palpably arbitrary; does not present a legitimate state purpose for the classification; and that the similarly situated construction contractors who are *all* members of the class that build the same massive one-of-a-kind concrete structures on real property on Arkansas job sites are *not* treated alike by the DF&A's arbitrary classification of precasters who utilize the "precast" method as part of their construction activities. Featherlite made no sale (as a manufacturer-vendor) to itself (as a subcontractor-erector) of the components of these massive concrete structures. Instead, in accordance with its obligations as a subcontractor under a "lump sum" contract, Featherlite simply purchased raw materials, supplied construction labor, and built large concrete structures that were

permanently attached to real property on the various Arkansas job sites. The exact same results were achieved by general contractors or specialty cement subcontractors who utilized the "poured-in-place" or "tilt-up" method to build the same concrete structures that were permanently attached to real property on Arkansas job sites. All construction contractors should be considered the controlling classification, and *all* such construction contractors must be treated the same for Arkansas' Sales and Use Tax purposes.

There have been a number of previous decisions rendered by this Court where the state or local taxes were declared to have violated the provisions of the Equal Protection Clause, either because (1) there was no legitimate state purpose served by the classification (*Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *WHYY v. Glassboro*, 393 U.S. 117 (1968); and *Wheeling Steel Corp. v. Gladner*, 337 U.S. 562 (1949)); or (2) the classification was found to be palpably arbitrary, feigned or illusory, and, therefore, not reasonably related to the otherwise legitimate state purpose (*Allegheny Pittsburgh Coal Co., supra*; *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935); and *Royster Guano Co. v. Virginia*, *supra*).

No Legitimate State Purpose Served By Classification. The Petitioner submits that there is absolutely no legitimate state purpose being served by the DF&A's different classification of construction contractors who use the "precast" method of constructing permanent concrete structures in Arkansas by performing a part of the fabrication services at plants "off of" the job sites, as compared to similar construction contractors who build the permanent concrete structures on the Arkansas job site utilizing the "poured-in-place" or "tilt-up" method of construction. The Arkansas General Assembly has statutorily classified *all* contractors alike, as the consumers of the raw materials purchased by them for inclusion in the concrete structures being constructed on job sites in Arkansas. There is absolutely no legitimate state purpose being served by the tax administrator's classifying contractors utilizing the "precast" method of construction differently from those

utilizing the "poured–in–place" method. In fact, as noted by the Arkansas Supreme Court in its decision in this case, utilization of the "precast" method of construction can result in a stronger structure that is more quickly built, than utilization of the "poured–in–place" method of construction. Thus, one could visualize a reason why the state's encouragement of "newer" and "better" methods of construction would be considered a "legitimate state purpose." However, there can be no "legitimate state purpose" being served by discriminatorily taxing such "newer" method of construction at a substantially greater amount than the more "traditional" methods of construction are taxed. The Petitioner submits that even these minute differences in methods of construction noted by the Arkansas court have no real effect upon the end result achieved by utilizing either construction method. The property developer secures the parking deck, bridge or warehouse through the utilization of either construction method.

Therefore, the Petitioner submits that, for the purposes of their Equal Protection challenge, "a parking deck is a parking deck is a parking deck." The Arkansas Supreme Court did *not* properly apply the rational basis test in this case, it merely noted the minute differences between the "precast" method and the "poured–in–place" methods of construction. Such differences, for purposes of determining the constitutionality of the Sales Tax or Use Tax liabilities of similarly situated constructon contractors, are differences that are palpably arbitrary, and have no relationship to or basis in the Arkansas General Assembly's legislative actions. [18]

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[18] In fact, the Petitioner submits that the Arkansas legislature's adoption of Act 1068 of 1985 to treat an "off–site" manufacturer of factory built homes the same, for Sales Tax and Use Tax purposes, as the state treats a contractor who builds a house "on–site," is a clear indication that the classification difference drawn by the DF&A's "administrative practice" in this case is *not* in line with the Legislature's intent, and is clearly not supported by any legislatively created distinction. It is interesting to note that in this Court's decision in *Williams v. Vermont, supra*, Justice White, in analyzing Vermont's statutory scheme of taxation for Equal Protection purposes, quoted from the Court's earlier decision in *Halliburton* (a Commerce Clause case) in holding that equal treatment for in–state and out–of–state taxpayers similarly situated is the condition precedent for a valid Use Tax on goods imported from out–of–state. Shortly after this Court's rendering of the *Halliburton* decision, the Arkansas Supreme Court itself held, in *Larey v. Continental Southern Lines, Inc.*, 243 Ark. 278, 283, 419 S.W.2d 610,

No Rational Basis For The Classification. The *only distinctive difference identified by the Arkansas Supreme Court* between the construction contractors who use the "precast" method and those construction contractors who use the "poured-in-place" method is that first method produces stronger structures in a shorter period of time. Though the Petitioner submits that such differences do *not* present a rational basis for distinguishing between these two similarly situated types of construction contractors, it does submit that it would seem more logical that the State of Arkansas would encourage the development of this newer and technologically superior method of "precast" construction, not impose a tax burden upon it that is 400% greater than the same tax burden imposed upon the construction contractor who uses the more traditional "poured-in-place" method of construction.

Featherlite submits that the true proof of the arbitrariness of the DF&A's interpretive "administrative practice" that it challenges here, for Equal Protection Clause purposes, is the supposedly different Sales Tax or Use Tax treatment that will be

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614-615 (1967) that:

> To afford equal protection of the laws, required by Amendment 14 to the United States Constitution, such classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated may be treated alike. *Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412. Equality for Purposes of Competition and the flow of commerce is measured in dollars and cents and not legal abstractions. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64.

Therefore, even though the Arkansas Supreme Court has acknowledged the requirement that similarly situated construction contractors must be treated equally for Sales Tax and Use Tax purposes to meet the requirements of the Equal Protection Clause, the Court below, utilizing its "fictional sale" theory, held that the Revenue Division's classification was based upon a distinction between "vendors and consumers." However, the Arkansas court offers absolutely no logic for its determination that "the distinction is not arbitrary and does not impermissibly distinguish between individual citizens." In fact, Featherlite submits that there is a dearth of legal reasoning set forth by the Arkansas Supreme Court's analysis of the Petitioner's Equal Protection challenge in this case.

accorded by DF&A to the use of the "tilt-up" method of construction; based upon whether this method is used by a general contractor or by a specialty cement subcontractor. The Manager of the Sales and Use Tax Section of DF&A stated in his affidavit (R. 425-428) that if the general building contractor produces the components for a concrete structure utilizing the "tilt-up" method of construction, DF&A will require Sales Tax or Use Tax to be paid *only* upon the cost of the raw materials consumed by the general contractor. However, if the same "tilt-up" method of construction is used (even on-site) by a specialty cement subcontractor, DF&A will require the specialty cement subcontractor to report Sales Taxes or Use Taxes based upon the total charge made by this specialty subcontractor (i.e. the total cost of raw materials, plus all labor and overhead, plus profit), i.e. the same as DF&A attempts to impose Arkansas' Use Tax upon Featherlite in this case. Featherlite submits that such an arbitrary and capricious differential in classification by DF&A's "administrative practice" is palpably arbitrary and that this discrimination is invidious, as those terms are used by the standards set in this Court's prior Equal Protection decisions.

Instead, Featherlite submits that this arbitrary classification by DF&A of specialty cement subcontractors and general contractors is nothing more than an attempt by the taxing authority to be consistent in its treatment of the construction contractor who uses the "precast" method of construction (and forms the component parts of the concrete structure 100 miles or more from the job site) in the same manner that the taxing agency says it will treat the specialty cement subcontractor who forms the component parts of the concrete structure five (5) feet or less away from their final destination. Such a discrete classification by the DF&A's "administrative practice," for Equal Protection purposes, is one without a "rational basis" and it should be summarily rejected by this Court's reversal of the Arkansas Supreme Court's decision in this case.

Therefore, the Petitioner submits that the DF&A's "administrative practice" of treating construction contractors who utilize the "precast" method of construction differently from construction contractors who use the "poured-in-place" or "tilt-

up–wall" methods for constructing massive, one–of–a–kind architecturally designed and specially engineered cement structures that are permanently affixed to real property on job sites in Arkansas, is a classification that is palpably arbitrary, and causes similarly situated taxpayers to be treated in a substantially different manner for Arkansas' Sales Tax and Use Tax purposes. Therefore, this arbitrary classification created by the DF&A's "administrative practice" violates the constitutional rights guaranteed to all construction contractors who utilize the "precast" method of constructing large concrete structures in Arkansas, whether their plants are located within or without the State of Arkansas, to enjoy the equal protection of the laws.

CONCLUSION

For the particular reasons stated above, the Petitioner submits that its Petition for a Writ of Certiorari to the Arkansas Supreme Court should be granted, so as to provide this Court with a vehicle to answer the important Commerce Clause and Equal Protection questions that are presented by the Petitioner. The Petitioner further respectfully suggests that the issues presented by this Petition may well be susceptible to summary disposition by this Court's reversal of the Arkansas Supreme Court's Opinion, since the evidentiary record was fully stipulated and this Court has previously decided the Commerce Clause issue in favor of a taxpayer in a case presenting virtually identical facts, and the evidentiary record in this case provides no rational basis for Equal Protection purposes for the DF&A's "administrative practice" of taxing similarly situated construction contractors in a substantially different manner.

Respectfully submitted,

JUNE 5, 1992

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APPENDIX A

Office of the Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201
March 9, 1992

Eugene G. Sayre
Attorney at Law
425 W. Capitol Ave.
3400 TCBY Tower
Little Rock, AR 72201-3472

Re: 91-91 Jim Pledger, Director of Arkansas Department of Finance and Administration v. Featherlite Precast Corporation

Dear Mr. Sayre:

The Supreme Court made the following order in the above styled case today:

"Petition for Rehearing is denied.
Brown, J., not participating."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh
cc: Malcolm P. Bobo
Jacquetta Alexander, Clerk
(#89-5397)
Mary Stallcup

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 91-91

Opinion delivered: Jan. 27, 1992
REVERSED

JAMES C. PLEDGER, DIR. DEPT. OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS, and JIMMY LOU FISHER, Treasurer of the STATE OF ARKANSAS, APPELLANTS,

V.

FEATHERLITE PRECAST CORP., on behalf of itself and all other similarly situated taxpayers, APPELLEE.

ROBERT H. DUDLEY, Associate Justice

Appellee Featherlite, a corporate taxpayer, and members of the class of taxpayers it attempts to represent, are producers of precast concrete components used in the construction of concrete structures such as bridges and parking decks. The components produced by taxpayer Featherlite are made at its out-of-state plant according to the specifications of its customer. The components are then transported to the job site in Arkansas and assembled into a structure.

From May 1, 1981, through December 31, 1986, the period of the use tax audit, the taxpayer was at times a producer-vendor of the component parts, and at other times also subcontracted to assemble the structure. Depending upon its capacity, the taxpayer reported Arkansas use tax on either its vendor use tax permit or its

consumer use tax permit. Regardless of which permit it used to report the tax, it calculated the tax due based upon the cost of raw materials used in making the components instead of the sales price of the components. In addition, it neither collected nor remitted tax on the delivery charges included on the bills to its customers for the concrete components.

After the tax audit was completed, the Revenue Division of the Department of Finance and Administration made a proposed use tax assessment and, in doing so, calculated the use tax based upon the sales price of the concrete components, giving credit for the use tax already reported on the cost of the raw materials. The proposed assessment also included use tax on the delivery charges billed to the customers on the taxpayer's invoices. The taxpayer protested the proposed assessment and requested an administrative hearing. There the taxpayer contended that requiring producers of precast components to pay tax based upon the sales price of the components, rather than the cost of the raw materials used, placed precasters at a competitive disadvantage, since a general contractor that built the same type of structure would do so by pouring the concrete in place, without using precast components, but would be required to pay tax only on the cost of the raw materials used. The Administrative Law Judge held that precast concrete components are items of tangible personal property and the correct basis for the tax is the sales price of the component, not the cost of the raw materials used in producing it, and sustained the assessment. The taxpayer paid the assessment under protest and filed its appeal in the Chancery Court of Pulaski County, asserting that the revenue division's interpretation of the use tax statutes constituted an illegal exaction. It sought a refund of the $195,844.41 which it had paid under protest; sought an accounting of all taxpayers who might have been similarly taxed; sought refunds for all similarly situated taxpayers who, after the date of filing of this suit, might have been, or would be, taxed in the same manner as this taxpayer; sought to have declared illegal the Revenue Division's interpretation of the use tax statutes and to enjoin the Revenue Division from so interpreting these statutes; and sought an attorney fee from the resulting common fund.

The Director and the Treasurer answered and the parties entered into a stipulation of facts. The Chancellor certified the case as an illegal exaction class action. The parties submitted briefs on cross-motions for summary judgment. On December 20, 1990, the Chancellor wrote a two sentence letter to the parties stating that he found the taxpayer's argument more convincing. On December, 31, 1990, the Chancellor's last day in office, he signed a detailed thirty-six page order which found for the taxpayer on every count. The attorneys for the Director and the Treasurer were apparently not given the opportunity to approve or disapprove the form of the precedent. We reverse on both the merits and on the procedure.

The appellant Director and Treasurer first argue that the Chancellor erred in holding that he had jurisdiction of this case under Article 16, Section 13, the illegal exaction provision, of the Constitution of the State of Arkansas.

The illegal exaction provision and the cases interpreting it encompass two (2) different types or kinds of exactions. One type involves the prevention of a misapplication of public funds or the recovery of funds wrongly paid to a public official. *See, e.g., Brewer v. Hawkins*, 242 Ark. 460, 408 S.W.2d 492 (1966). We have given this type of exaction an expansive interpretation because taxpayers are the equitable owners of all funds collected by a government and, in most of the cases, are liable to replenish the funds exhausted by a misapplication or wrongful payment. Under these conditions taxpayers are entitled to broad relief. *See, e.g., Samples v. Grady*, 207 Ark. 724, 182 S.W.2d 875 (1944). For convenience, we label this type of case a "public funds" exaction case.

The case now before us involves a wholly different type of exaction. It does not involve the "public fund" doctrine, and therefore, the same reasoning is not applicable to it. This exaction case involves a taxpayer who seeks to enjoin a government from taxing him. In this second kind of exaction case, which, for convenience, we label an "illegal tax" exaction case, the exaction itself must be alleged to be illegal before the chancery court has

jurisdiction under the constitutional provision. It is true that we have many cases in which the collection of taxes has been enjoined under the illegal exaction provision, but all involve a tax that was itself illegal. See for example *Greedup v. Franklin County*, 30 Ark. 101 (1875), an attempt to collect a county levy in excess of the five mills allowed by the constitution; *Lyman v. Howe*, 64 Ark. 436, 42 S.W. 830 (1897), a tax based upon an assessment not made by the assessor; *Ragan v. Venhaus*, 289 Ark. 266, 711 S.W.2d 467 (1986) and *Merwin v. Fussell*, 93 Ark. 336, 124 S.W. 1021 (1910), attempts to collect taxes not properly voted by the people; *McDaniel v. Texarkana Cooperage & Mfg. Co.*, 94 Ark. 235, 126 S.W. 727 (1910), a tax levied by a county having no jurisdiction over the property; *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982) and *Waters Pierce Oil Co. v. Little Rock*, 39 Ark. 412 (1882), taxes which were not authorized by the city's delegated power of taxation. However, we have always held that if the taxes complained of are not themselves illegal, a suit for illegal exaction will not lie. *Schuman v. Ouachita County*, 218 Ark. 46, 234 S.W.2d 42 (1950). In *Taber v. Pledger*, 302 Ark. 484, 489, 791 S.W.2d 361, 364 (1990), we wrote that "a suit to declare a tax statute constitutional, and therefore void" comes within the illegal exaction provision, while a suit "to determine whether the taxpayer's transactions fall within an exemption created by statute" does not come within the section. More important, and precisely on point in this case, we have held that a flaw in the assessment or collection procedure, no matter how serious from the taxpayer's point of view, does not make the exaction itself illegal. *Schuman v. Ouachita, supra* (citing *Missouri Pacific Ry. Co. v. Fish*, 181 Ark. 863, 28 S.W.2d 333 (1930) and *Beard v. Wilcockson*, 184 Ark. 349, 42 S.W.2d 557 (1931)). Here, the taxpayer does not contend that the use tax is itself illegal, but rather contends that the assessment of its individual tax, and that of others similarly situated, is carried out in an unconstitutional and illegal manner. Consequently, this suit does not come within the illegal exaction provision of the Constitution of Arkansas, and the Chancellor erred in certifying it as a class action coming within that provision.

Since the taxpayer has not pleaded a case that comes within the illegal exaction provision, it is relegated to statutory relief. Ark. Code Ann. § 26-18-406 (1987) provides that relief for a taxpayer is precluded unless that taxpayer has paid the tax under protest, or else posted bond, within thirty (30) days of the issuance of the notice and demand for payment of the assessment. No members of the alleged class, other than appellee Featherlite, timely tendered taxes under protest and, consequently, the attempt to bring all of the other precaster taxpayers into this suit is fatally defective.

The Chancellor additionally ruled that the Revenue Division's policy in interpreting the gross receipts (sales) tax and compensating (use) tax laws was contrary to the intent of the General Assembly. The Director and the Treasurer correctly assign this ruling as error. The Revenue Division assessed the taxes on the "sale" of "tangible personal property." Such an interpretation conforms with the plain meaning of the applicable statutes.

The applicable statutes are as follows:

Ark. Code Ann. § 26-52-301 (1987), in pertinent part, provides:

> There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> (1) *Tangible personal property*; ... [Emphasis added.]

Ark. Code Ann. § 26-52-103 (1987), in pertinent part, provides:

> (a) The following words and phrases, except where the context clearly indicates a different meaning when used in this act, shall have the following meanings:

. . .

(3)(A) "Sale" is declared to mean the *transfer* of either the title or possession...for a valuable consideration of *tangible personal property*, regardless of the manner, method, instrumentality, or device by which the transfer is accomplished. [Emphasis added.]

. . .

(4) "Gross receipts" or "gross proceeds" means the total amount of consideration for the sale of tangible personal property ... without any deduction on account of the cost of the properties sold, labor service performed, interest paid, losses, or any expenses whatsoever.

. . .

(7) "Seller" means every person making a sale in an established business as defined in this section;

. . .

(9) "Consumer" or "user" means the person to whom the taxable sale is made or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies, and equipment used or consumed by them in performing any contract, and the sales of all such property to contractors are taxable sales within the meaning of this act.

Ark. Code Ann. § 26-52-307 (1987) provides:

> Sales of service and tangible personal property including materials, supplies, and equipment made to contractors who use them in the performance of any contracts are declared to be sales to consumers or users and not sales for resale.

Ark. Code Ann. § 26-53-106(a) (1987) provides:

> There is levied and there shall be collected from every person in this state a tax or excise for the privilege of storing, *using*, or consuming within this state any article of tangible personal property purchased for storage, use, or consumption in this state at the rate of three (3%) percent of the sales price of the property. [Emphasis added.]

Ark. Code Ann. § 26-53-102 (1987) in part provides:

> As used in this subchapter, unless the context otherwise requires:
>
> (1) "Sales price" means the consideration paid, or given ... to the vendor for the article of the tangible personal property ... without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, ... or any other expenses whatsoever....
>
> . . .
>
> (4) "Vendor" means and includes every person engaged in making sales of tangible personal property ....
>
> . . .

> (11) *"Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.* [Emphasis added.]

Ark. Code Ann. § 26-53-201 (1987) provides:

> As used in this subchapter, unless the context otherwise requires, "contractors" are consumers of all tangible personal property used or consumed in the performance of a contract in this state and of all tangible personal property stored for use or upon which the contractor may exercise any right or power in this state.

Ark. Code Ann. § 26-53-203(a)(1) (1987) provides:

> All tangible personal property which is procured from without this state for use, storage, or consumption including machinery, equipment, repair or replacement parts, materials, and supplies used, stored, or consumed by a contractor in the performance of a contract in this three percent (3%) of the purchase price as provided by the Arkansas Compensating Tax Act, § 26-53-101 et. seq. ....

The Revenue Division's interpretation is in conformity with the plain meaning of the foregoing statutes. The Revenue Division calculated the sales and use tax due on the sale of precast concrete components based upon the "sales price" charged the general contractor. The precast concrete components are large specially designed and constructed pieces of concrete and are "tangible personal property." The pieces can be seen and touched; they are tangible. They are not real property at the time they are transported to the job site; rather they are still personal property. Thus, the Revenue Division has interpreted the statutes just as they read, giving the words their ordinary and usually accepted meaning.

Appellee Featherlite admits that the Revenue Division's interpretation is literally correct, but urges us to hold that the General Assembly intends for the Division to use a more "flexible" interpretation. The taxpayer then supplies us with five possible more "flexible" interpretations, but we need not consider other "flexible" interpretations because the statutes are not ambiguous and the Revenue Division's interpretation of them is in accordance with their plain and accepted meaning.

Appellee Featherlite contends that the Revenue Division's interpretation is unfair because it gives a general contractor, or the specialty subcontractors who pour "in place," an unfair advantage over precasters. There are two short answers to the argument. First, there is a real distinction between the off-site precasting process and the on-site pouring of concrete into forms. The on-site pouring method of construction is much slower than the pre-cast method, since on-site contractors, or specialty subcontractors, must wait for the cement to cure in each form before going to the next forms; for example, to build the next floor. Using the on-site method, a contractor might take months to complete the entire structure, but with the use of the precast method it might take only weeks. Also, precasting allows the concrete to be prestressed making it stronger than concrete poured on site. The precast process results in a superior product which the general contractor often chooses to purchase. The product that is sold to the general contractor is "tangible personal property." On the other hand, the general contractor's product is a building or a bridge that is so affixed to the land that it becomes real estate. Second, even if there were no distinction other than the "sale" of "tangible personal property" to the general contractor, it does not mean that the Revenue Division is incorrectly interpreting the applicable statutes. The applicable statutes themselves make the distinction. The Chancellor also found that the Revenue Division's interpretation of the sales and use tax statutes violates the Commerce Clause of the Constitution of the United States. This finding is also assigned as error, and once again, we hold the assignment is meritorious. "[E]qual treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." *Halliburton Oil Well Co. v. Reily*,

373 U.S. 64, 70 (1963). The sales and use taxes at issue are not imposed in a way that creates an inequity between in-state and out-of-state taxpayers. The residence of the precast company has no bearing upon the amount of taxes it pays. The Revenue Division imposes both the sales and use taxes upon the price of the concrete components regardless of whether they are precast within or without the state. Thus, there is equal treatment for similarly situated in-state and out-of-state taxpayers in the imposition of the taxes and, as a result, there is no violation of the commerce clause. It was error for the Chancellor to hold otherwise.

In order to sustain the ruling of the Chancellor, appellee Featherlite contends that the taxes are imposed in a way that creates an inequity between subcontractors and general contractors. As previously set out, there are material differences between subcontractors that sell tangible personal property and general contractors that purchase that personal property. However, appellee Featherlite argues that when it serves as the subcontractor in assembling a structure, it is treated differently than a general contractor because Featherlite must remit tax on the sales price of tangible personal property, while the general contractor must pay tax only on the cost of the raw materials which go into the structure. The argument ignores the fact that when appellee Featherlite has produced tangible components and shipped them to the site, and then acts as a subcontractor in assembling a structure, it is assembling pieces or "tangible personal property." Quite differently, the general contractor that does not purchase precast products would be pouring concrete into forms on site and therefore would be using only raw materials in its construction work.

The general contractors bid against each other to construct a finished structure ready for occupancy. The amount of a general contractor's bid is determined by the anticipated cost of the job. In order to anticipate the cost, the general contractor must weight the cost of precast components against the cost of pouring concrete in place. It is only after this decision is made that the precaster enters the building process. If a general contractor has decided to use precast components it will seek bids from precasters. The precasters will then bid against each other to supply the precast

concrete components to the winning general contractor. Even when the precaster subcontracts to assemble the components, the general contractor must finish the structure. Thus, the precasters are not in competition with the general contractors and the taxes are not imposed in such a manner as to give the general contractors an unfair advantage over the precasters.

Appellee Featherlite acts in two distinct capacities. In one capacity it is a producer–vendor, and in the other, it is a producer–subcontractor. The case of *Republic Steel Corp. v. McCastlain, Comm'r*, 240 Ark. 979, 403 S.W.2d 90 (1966) sets out the basis for taxation in each capacity. In that case, Republic was an out–of–state manufacturer of steel reinforcing bars used in the construction of military missile launching concrete silos. Republic contracted with an Arkansas general contractor to provide and install steel bars. Republic reported the use tax due based upon the cost of the raw materials used to make the steel bars, rather than the sales price of the bars, and the Revenue Division made a deficiency assessment based upon the difference between the raw material costs and the sales price, just as it did in the case at bar. Republic contested the tax. On appeal, we held that Republic acted in two separate capacities; one, as a manufacturer making the steel bars and, two, as a subcontractor installing them, and that as a manufacturer, it transferred title to the steel bars to itself in its capacity of a subcontractor. *Id.* at 981, 403 S.W.2d at 92. Based upon this rationale, we held that a sale to the subcontractor had occurred and that the sales price of completed steel bars, rather than the cost of the materials used to make them, was the correct basis to use in calculating the tax due. Appellee Featherlite is being taxed in exactly the same manner in this case.

The Chancellor additionally found that the Revenue Division's application of the sales and use taxes violated the Equal Protection Clauses of the Constitutions of the United States and the State of Arkansas. Again, we hold that the Chancellor erred.

In *Larey, Comm'r v. Continental Southern Lines, Inc.*, 243 Ark. 278, 283, 419 S.W.2d 610, 614–615 (1967), we wrote:

> To afford equal protection of the laws, required by Amendment Fourteen to the United States Constitution, such classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike. Equality for the purposes of competition and the flow of commerce is measured in dollars and cents and not in legal abstractions. [Citations omitted.]

"In deciding whether an equal protection challenge is warranted, there must first be a determination that there is a state action which differentiates among individuals." *Bosworth v. Pledger*, 305 Ark. 598, 601, 810 S.W.2d 918, 920 (1991). Once equal protection is invoked, the rational basis test must be applied to determine whether there exists any rational basis for the classification. *Bosworth v. Pledger, supra*. The rational basis test is generally applied to the review of tax legislation. *Streight v. Ragland, Comm'r*, 280 Ark. 206, 212, 655 S.W.2d 459, 462 (1983). The task of the court is "to consider if *any* rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose." *Id.* at 215, 655 S.W.2d at 464.

As previously set out, there is a rational basis for the Revenue Division to tax general contractor consumers differently than vendors and subcontractors. The concrete components sold by appellee Featherlite come within the statutory definition of "tangible personal property" which is "personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses." Ark. Code Ann. § 26-53-102(11) (1987). Thus, the Revenue Division's interpretation that the concrete components are subject to taxation is valid.

On the other hand, the Revenue Division treats contractors as purchasers or consumers and requires them to pay tax on the sales price of items they purchase. The applicable statute provides:

> All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract, and the sales of all such property to contractors are taxable sales within the meaning of this act....

Ark. Code Ann. § 26-52-103(9) (1987).

If a general contractor purchases a precast concrete component, the tax due is based upon the price of that component. However, if a general contractor purchases the raw materials and produces the component from those raw materials, it is taxed only on the price paid for the raw materials.

Thus, the Revenue Division's classification is based upon a distinction between vendors and consumers. Vendors such as appellee Featherlite are required to remit taxes based upon the sales price of the finished product at the time of the sale, while consumers, such as general contractors, are required to pay the tax based upon the price of the item purchased at the time of purchase. The distinction is not arbitrary and does not impermissibly distinguish between equal citizens.

The Chancellor also held that delivery charges that were included in appellee Featherlite's bill to the general contractor were not subject to sales or use tax. That ruling is also in error.

As previously set out, appellee Featherlite produces and sells the precast concrete components, sometimes as a producer-vendor and sometimes as a subcontractor. Appellee billed the general contractor for the components, the erection charges, and the delivery charges. The Revenue Division assessed a tax deficiency based on all of the above charges, including the delivery charges. Appellee argued below, and the Chancellor held, that since appellee contracted with an independent carrier to deliver the components, and then separately set out the delivery charges, it should not be obligated to collect the tax on the charges. That ruling is in direct conflict with our holding in *Belvedere Sand &*

Gravel Co. v. Heath, 259 Ark. 767, 536 S.W.2d 312 (1976). The Revenue Division is not attempting to collect a tax on hauling services as such, but is collecting a tax on the total consideration received by the vendor for the sale of tangible personal property, and that included delivery.

Reversed and remanded for entry of a decree consistent with this opinion.

Brown, J., not participating.

APPENDIX C

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
SECOND DIVISION

FEATHERLITE PRECAST CORPORATION,
On Behalf of Itself and All
Other Similarly Situated Taxpayers — PLAINTIFF

vs. — NO. 89-5397

JAMES C. PLEDGER, DIRECTOR,
DEPARTMENT OF FINANCE AND
ADMINISTRATION, STATE OF
ARKANSAS, and JIMMIE LOU FISHER,
Treasurer of the STATE OF ARKANSAS — DEFENDANT

MEMORANDUM OPINION

This case came before the Court for decision on December 20, 1990, based upon the pleadings, the Stipulation of Facts, the cross Motions for Summary Judgment of the Plaintiff and the Defendants, and the respective Briefs of the parties.

Question Presented

The question presented for decision in this class action "illegal exaction" case is whether the Sales Tax and/or Use Tax base for sales by precasters of components for large specially designed and engineered concrete structures that are erected on job sites in Arkansas and permanently attached to real estate should be (1) the cost or value of the raw materials incorporated into these concrete structures (as reported by the representative precasters), or (2) the total contract price charged by the precaster to the Arkansas customer, plus any hauling or freight charges (as demanded by the Arkansas Department of Finance and Administration ("DF&A")). In essence, the question presented is whether the precasters are

mere materialmen or whether they are also performing construction services.

After considering the undisputed factual record and the legal positions taken by the parties in their briefs, the Court finds the position of the Plaintiff–class to be more persuasive. The Court therefore makes the following findings of fact and conclusions of law, pursuant to the provisions of Rule 52 of the Arkansas Rules of Civil Procedure:

Findings of Fact

1. Featherlite Precast Corporation (hereinafter referred to as Featherlite) is a wholly owned subsidiary of Justin Industries, Inc. Featherlite is a corporation organized and existing under the laws of the State of Texas. Featherlite (or its predecessor corporate entity) qualified to do business as a foreign corporation in the State of Arkansas on September 5, 1973. (Stip. ¶ 1)

2. Featherlite has been primarily engaged in the business of producing and erecting large specially designed and engineered concrete structures, throughout the south central region of the United States. During the taxable periods in question, Featherlite had plants at several locations in Texas and Louisiana, and at Memphis, Tennessee. It is Featherlite's sales to Arkansas consumers from its Memphis, Tennessee, plant that are specifically involved in this Use Tax audit dispute. (Stip. ¶ 2)

3. James C. Pledger is the duly appointed and acting Director of the Department of Finance and Administration of the State of Arkansas and, as such, is the official who is responsible for the interpretation and administration of Arkansas' state and local Sales Tax and Use Tax laws.

4. Jimmie Lou Fisher is the duly elected and acting Treasurer of the State of Arkansas. Defendant Fisher is responsible for disbursing all state revenues (including state and local Sales Taxes and Use Taxes collected and deposited in the State Treasury by Defendant Pledger and his agents) to the various state agencies and

to the local cities and counties wherein such local Sales Taxes and Use Taxes are imposed.

5. At its Memphis, Tennessee, plant, Featherlite worked with the property developers' architects or engineers in designing large concrete structures (e.g. parking decks, warehouses, bridges, etc.). Once the concrete structure was designed, then the individual pieces or components of the entire structure were formed, on a somewhat assembly line basis, by combining cement, sand, gravel, water and reinforcing steel in forms at Featherlite's Memphis, Tennessee, plant site. Once these individual components of the entire concrete structure have been cured, the forms have been removed, and the components have passed plant inspection, then each of the components are moved to the Arkansas job site by independent ICC authorized trucking companies and the components are assembled, piece by piece, on the job site into a completed concrete structure. (Stip. Ex. 1, Dolson Affidavit, ¶ 8)

6. Featherlite usually also provided the oversight and erecting services on the job site. The company generally preferred to conduct such erecting services so as to limit the breakage claims that occurred in assembling the entire concrete structure. During each of the years 1981 through 1986, Featherlite held a valid Arkansas contractor's license under the classification "Heavy Building." (Stip. Ex. 2, Dolson Supp. Affidavit, Ex. 2-H)

7. During the period from May 31, 1981, through December 31, 1986, Featherlite sold a number of precast concrete structures to Arkansas consumers. Generally, these Arkansas customers were general contractors who had entered into contracts with various property developers to provide certain improvements to real property. In other instances, Featherlite sold its completed concrete structures to large corporations (e.g. International Paper Co.) and state agencies (e.g. Arkansas Department of Prisons) who either erected the concrete structures themselves or arranged for the structure's erection by other subcontractors. (Stip. Ex. 2, Dolson Supp. Affidavit, ¶¶ 3 and 4, Ex. 2-I)

8. When Featherlite entered into a contract with a general contractor to provide a completed concrete structure assembled on the job site in Arkansas, the uniquely engineered or designed component parts of the concrete structure were formed in Featherlite's Memphis, Tennessee, plant, the component parts were transported to the Arkansas job site by an independent ICC authorized carrier (since Featherlite had no trucks of its own) and the hauling charges were passed along by Featherlite by separately stating them on its invoices (without any markup or profit being attributed to these hauling charges). Featherlite then erected or assembled the component parts of the concrete structure on the Arkansas job site, so that the structure was permanently attached to the real property and the component parts were attached to each other. When the erection was completed, the general contractor and the property developer had acquired a completed concrete structure permanently attached to real property (e.g. warehouse, parking deck, bridge, etc.). In providing such erected structure on the Arkansas job site, Featherlite considered that it was a subcontractor to the general contractor who was obligated to provide the completed concrete structure to the developer of the project. (Stip. Ex. 1, Dolson Affidavit, ¶ ¶ 3–5)

9. The cost of the raw materials (i.e. sand, gravel, water, cement, and reinforcing steel) used in forming the component parts of Featherlite's concrete structures, as with the cost of raw materials used to construct any building or structure, represented a very small percentage (usually 10%–40%) of the actual overall cost or charge to the customer for the concrete structure itself. Included in the "plant price" or "contract price" charged by Featherlite to its Arkansas customers were also the costs of all labor utilized in the actual forming of the individual precast concrete components of the concrete structure, the costs of design services, the costs of general overhead and management, plus the costs associated with sales and bidding, as well as the company's profit attributable to the sale of such concrete structure. (Stip. Ex. 1, Dolson Affidavit, ¶ 3; Ex. 3, McConnell Affidavit, ¶ ¶ 3 and 6; Ex. 4, Berglund Affidavit, ¶ ¶ 3 and 6)

10. The concrete structure's components that are produced by Featherlite and the other similarly situated precasters (whether the precaster's plants are located within or without the State of Arkansas) are specially designed or custom designed for inclusion only in specific concrete structures (e.g. warehouses, parking decks, bridges, etc.), and these components are not made for general sale to building supply stores and are not inventory items for general building supplies (e.g. concrete blocks, concrete bricks, etc.). Instead, the components of the concrete structures in question were designed for use in specific concrete structures that are permanently affixed to real property in Arkansas (Stip. Ex. 3, McConnell Affidavit, ¶ 2; Ex. 4, Berglund Affidavit, ¶ 2).

11. Though Featherlite and the other similarly situated precasters (whether their plants are located within or without the State of Arkansas) act as suppliers or subcontractors to the general construction contractors, the competitors of Featherlite are either the general construction contractors themselves or specialty subcontractors who do the cement construction work by pouring the components of the concrete structure "in place" in forms on the Arkansas job site. Whether the concrete structure is precast "off site" and erected "on-site" or whether it is poured "in place" on the job site, the Arkansas customer (the general contractor or the developer of the real property) gets exactly the same end product, i.e. an immovable concrete structure constructed to architectural or engineering specifications that is permanently attached to real property in Arkansas. (Stip. Ex. 1, Dolson Affidavit, ¶ 7; Ex. 3, McConnell Affidavit, ¶ ¶ 4 and 6; and Ex. 5, Berglund Affidavit, ¶ ¶ 4 and 6)

12. In the "on-site" construction method, utilized by either the general construction contractor or a specialty cement subcontractor, a cement batch plant is generally constructed or assembled close by or on the job site, or ready mix cement is secured from a local supplier. At the job site, the cement, gravel, sand, and water are mixed and they are placed into forms that contain the reinforcing steel. Once the cement is cured, the "in-place" forms are removed, and the process is repeated until the building is completed. This method of construction is much slower than the

utilization of the precast method, since the "on-site" contractors must wait for the cement to cure before setting forms on that cured cement to build the next floor or section. (Stip. Ex. 1, Dolson Affidavit, ¶ 8(b))

13. The developer of an Arkansas project (the ultimate consumer) acquires a completed concrete structure (e.g. warehouse, parking deck, bridge, etc.) attached to real property in Arkansas whether the concrete structure is completed (1) by the precasters' precasting and prestressing process or (2) by the "on-site" construction process. (Stip. Ex. 1, Dolson Affidavit, ¶ 8) An excellent comparison of the end result of these two processes is to compare the parking deck that was precast and erected by Featherlite for Pickens-Bond Construction Company of Little Rock, Arkansas, at the TCBY (Capitol) Tower parking garage located at Sixth and Spring Streets in Little Rock, Arkansas (Stip. Ex. 1, Dolson Affidavit, ¶ 11, Ex. 1-E; Stip. ¶ ¶ 16 and 17, Exs. 10 and 11), with the similar concrete parking decks constructed "on site" on Main Street for the City of Little Rock by Baldwin & Shell Construction Company of Little Rock, Arkansas (the component parts of these municipal parking decks were poured "in place" on the job sites). (Stip. ¶ ¶ 18, 19 and 20; Ex. 5, Shell Affidavit; Exs. 10-14)

14. The precasters (whether their plants are located within or without the State of Arkansas) maintain that there is no difference between the pouring of these specially designed components of these specially designed and engineered concrete structures, whether the components are produced (1) by pouring them in forms at the precaster's plant yards and then transporting them to the Arkansas job site, or (2) by pouring them "in place" in forms on the job site by the general contractor or specialty subcontractor. The precasters maintain that this lack of difference in the resulting end product is pointed up by comparing the "off-site" precasting of walls for a precast and prestressed concrete warehouse by a precaster with the "tilt-up wall" construction method now used by many general contractors in Arkansas for the construction of wall sections of a warehouse where the individual wall sections are poured into forms on the job site and (when the cement is cured),

the wall section is simply "tilted up" into position. This "tilt-up" method of construction by a general contractor is very similar to the off-site casting of similar components for such concrete structures, the only difference being the location of where the component is formed (i.e. "on the job site (by the general contractor) or off the job site (by a precaster)). (Stip. ¶ 21; Ex. 3, McConnell Affidavit, ¶ 3; Ex. 4, Berglund Affidavit, ¶ 3; Ex. 6, Workman Affidavit, Ex. 15)

15. Featherlite maintained records on each precast and prestressed concrete structure it produced at its Memphis plant and sold for erection in Arkansas. From these records, Featherlite was able to ascertain the costs of all raw materials (e.g. sand, cement, gravel, water, reinforcing steel, etc.) that were incorporated into each concrete structure. (Stip. Ex. 1, Dolson Affidavit, ¶ 12; Ex. 1-F)

16. Following the established and accepted reporting and remitting practice used by Featherlite in reporting Sales Taxes or Use Taxes due on the sales of its precast concrete structures in the States of Texas, Louisiana, and Tennessee (where it made sales of similar concrete structures), Featherlite (especially when it acted as a subcontractor erecting the components of the precast concrete structure on the Arkansas job sites) reported and paid state and local Arkansas Use Tax to the Sales and Use Tax Section of DF&A based upon the value or the cost of the raw materials that it purchased and incorporated into the components of the concrete structures that were produced and sold for permanent erection on Arkansas job sites. On either the Consumer Use Tax Reports or Vendor Use Tax Reports filed by Featherlite during the period from May 1, 1981, through December 31, 1986, Featherlite reported the entire "contract price" or "plant price" for the items sold each month, but deducted all costs attributable to labor, design, profit, etc., so as to report the Use Tax base to be only the costs of the "raw materials" (e.g. sand, gravel, cement, water, reinforcing steel, etc.) used to produce the components of each concrete structure sold for permanent erection in Arkansas. (Stip. ¶ 3(a); Ex. 1, Dolson Affidavit, ¶ ¶ 9(b), 12, 16, 18; Exs. 1-A, 1-B, 1-C, 1-F and 1-G)

17. Featherlite submits that the reporting position it adopted for reporting Arkansas Use Tax liability placed it in exactly the same reporting position as its "on-site" general contractor or specialty subcontractor competitors, i.e. both the "off-site" precaster and the "on-site" general contractor paid either Arkansas Sales Tax or Arkansas Use Tax on the costs of the raw materials (i.e. tangible personal property) utilized in the construction of the components of the concrete structures that were permanently attached to real property at job sites located in Arkansas, but not on any labor or other services related to the erection of these permanent structures. (Stip. Ex. 1, Dolson Affidavit, ¶ 12)

18. For purposes of administering Arkansas' Sales Tax and Use Tax laws, the Revenue Division of DF&A requires the general contractors (or specialty contractors) who construct permanent concrete structures on job sites in Arkansas by pouring the component parts of the concrete structures "in place" on the job site to pay or remit Arkansas' Sales Tax or Use Tax upon only the value of the raw materials (e.g. sand, gravel, cement, water, reinforcing steel) purchased for use in constructing such concrete structures. Such general contractors (or specialty subcontractors) are not required to pay or remit Arkansas' Sales Taxes or Use Taxes upon the value of labor used or other service charges incurred to construct these permanent concrete structures in Arkansas. (Stip. ¶ 4)

19. The Consumer Use Tax Reports and Vendor Use Tax Reports filed by Featherlite with the Arkansas Sales and Use Tax Section of the Revenue Division for the periods from May 1, 1981, through December 31, 1986, were audited by agents of DF&A. These auditors proposed that additional Use Tax was due from Featherlite on sales made by Featherlite in Arkansas during these taxable periods. These Use Tax deficiencies were computed by applying the applicable state and local Use Tax rates to (1) amounts equal to the difference between the value of the raw materials used by Featherlite in its concrete structure sold in Arkansas (i.e. Featherlite's reported Use Tax base) and the entire "plant price" or "contract price" Featherlite charged its Arkansas customers for such concrete structures, plus (2) the transportation

or hauling charges incurred for the delivery of the components of these concrete structures from Featherlite's Memphis plant to the various Arkansas job sites. (Stip. ¶ 5)

20. The Arkansas Department of Finance and Administration agrees with Featherlite that the charges for providing the labor used in the "erection services" on the job site by Featherlite and other precasters are not charges that should be included in the Arkansas Sales Tax or Use Tax base, even though such "erection charges" were separately itemized on Featherlite's invoice to its Arkansas customers (as were the "hauling charges"). (Stip. ¶ 3(c), Exs. 1-D, 1-F and 1-G)

21. Featherlite protested the proposed action by the auditors to the Revenue Division's Board of Hearings and Appeals. There, both Featherlite and other precasters of the components of large specially designed and engineered concrete structures (with plants located both within and without the State of Arkansas) submitted testimony by way of affidavit that all of the precasters believed the Revenue Division's interpretative administrative policy for imposing Arkansas' Sales Tax or Use Tax upon the entire "plant price" or "contract price," plus the hauling charges for transporting the completed components of the concrete structures from the precaster's plant to the Arkansas job site (as opposed to simply paying Arkansas' Sales Tax or Use Tax upon the cost or the value of the raw materials incorporated into the components of these permanent concrete structures erected in Arkansas), put the precasters at a distinctive competitive disadvantage with the "on-site" general contractors or specialty subcontractors when bidding on concrete structures to be permanently erected in Arkansas. The precasters submitted that this competitive disadvantage was due solely to the interpretative administrative policy adopted by the Revenue Division in imposing Arkansas' Sales Taxes and Use Taxes on the sales by all precasters of these precast concrete structures. (Stip. Ex. 1, Dolson Affidavit ¶ ¶ 9 and 18; Ex. 3, McConnell Affidavit, ¶ ¶ 5, 6, and 7; Ex. 4, Berglund Affidavit, ¶ ¶ 5, 6 and 7)

22. On the other hand, the Revenue Division of the DF&A maintains that the interpretative administrative position it has chosen for imposing Arkansas' Sales Taxes and Use Taxes upon the sales of precast concrete structures by *all* precasters (whether the precasters' plants are located within or without the State of Arkansas) does not discriminate in any manner against the precasters in the sale of their concrete structures, because the Revenue Division imposes Arkansas' Sales Tax upon sales by *all* Arkansas based precasters of prestressed concrete structures (e.g. Arkansas Structural Products, Inc. of Conway, Arkansas) in the same manner as it imposes the Arkansas' Use Tax upon sales by Featherlite and other out-of-state precasters with plants located outside of Arkansas. Likewise, the Revenue Division maintains that it imposes Arkansas' Sales Tax upon purchases by all general contractors who are located within the State of Arkansas, in the same manner as it imposes Arkansas Sales Tax or Use Tax upon purchases by out-of-state contractors who perform work in Arkansas in the construction of permanent concrete structures. (Affidavit of Clifton Poole, Sales and Use Tax Manager, Attachment to Defendants' Motion for Summary Judgment)

23. On May 2, 1988, the Administrative Law Judge of the Revenue Division's Board of Hearings and Appeals issued an Administrative Decision which denied Featherlite's protest and sustained the proposed deficiency assessment of state and local Use Taxes, except for the proposed penalties. Featherlite thereafter timely paid, "under protest," the following amounts before timely filing this suit for refund:

Tax Periods	Compensating (Use) Tax	Assessed Interest
05/01/81-04/30/84	$ 1,793.72	$ 929.00
05/01/81-04/30/84	44,742.41	23,475.08
05/01/84-10/30/85	93,403.83	27,405.74
12/01/85-12/31/86	3,348.58	746.05
TOTALS	$143,288.54	$52,555.87

24. Featherlite filed its original Complaint in this action on August 24, 1989, wherein it sought to recover: (1) for itself, the amount of Arkansas Use Tax, plus interest, that it had been paid "under protest" regarding the audit deficiency described above, and (2) on behalf of all concrete precasters (whether their plants are located within or without the State of Arkansas), a determination that the Revenue Division's interpretative administrative policy of requiring payment of Arkansas' Sales Tax or Use Tax upon the full "plant price," plus hauling charges, constituted an "illegal exaction" that should be enjoined under the provisions of Art. 16 § 13 of the Arkansas State Constitution, together with a refund of all amounts of such Arkansas Sales Tax or Use Tax paid or collected by these precasters in excess of the cost or value of raw materials used by the precasters (whether their plants are located within or without the State of Arkansas) in the production of components of their concrete structures that were produced and sold for permanent installation in Arkansas. Pursuant to this second cause of action, this case was certified as a class action on December 21, 1990, with Featherlite being certified as the representative of all precasters (whether their plants are located within or without the State of Arkansas) to contest the constitutionality and legality of the interpretative administrative policy of the Revenue Division of the DF&A in imposing Arkansas' Sales Tax and Use Tax upon the sales by precasters of specially designed and engineered concrete structures that are to be permanently affixed to real property in the State of Arkansas.

25. Any conclusion of law deemed to be a finding of fact is hereby adopted as a finding of fact.

Conclusions of Law

1. This Court has jurisdiction over the parties and the subject matter of this litigation, pursuant to the provisions of Ark. Code Ann. § 26-18-406 and the provisions of Art. 16 § 13 of the Arkansas State Constitution.

2. All precasters of concrete structures (whether their plants are located within or without the State of Arkansas), repre-

sented by Featherlite, are contesting the legality and constitutionality of the interpretative administrative policy adopted by the Revenue Division of DF&A regarding the imposition of Arkansas' Sales Taxes and Use Taxes upon the sales made by precasters of specially designed and engineered concrete structures that are permanently installed upon or affixed to real estate in the State of Arkansas. The representative of the Plaintiff-class maintains that:

> (a) The Arkansas Revenue Division has improperly and illegally interpreted Arkansas' Sales Tax and Use Tax laws by demanding that all precasters charge and pay these Arkansas excise taxes based upon the total "plant price," plus hauling charges (as opposed to only the value or cost of the "raw materials" incorporated into the specially designed components), of the precast and prestressed concrete structures the precasters produce and which are permanently attached to real property in the State of Arkansas;
>
> (2) The Arkansas Revenue Division's policy of requiring all precasters with out-of-state located plants to charge and pay Arkansas' Sales Taxes and Use Taxes based upon the full "plant price" of the permanent concrete structures, plus hauling charges (as opposed to only the value or cost of the "raw materials" incorporated into the specially designed components of the precast and prestressed concrete structures the precasters produce and which are permanently attached to real property in Arkansas, unconstitutionally discriminates against the right of these taxpayers to engage in interstate commerce in Arkansas, in violation of the "Commerce Clause" of the United States Constitution, Art. 1 § 8, Cls. 2, because such excise taxes are imposed only upon the cost or value of "raw materials" used by general contractors who pour such components for permanent concrete structures "in place" on the

Arkansas job sites; and

> (3) The Arkansas Revenue Division's policy of requiring all precasters (whether their plants are located within or without the State of Arkansas) to charge and pay Arkansas' Sales Taxes and Use Taxes based upon the "plant price" of the entire permanent concrete structure, plus hauling charges (as opposed to only the value of the "raw materials" used in these precast concrete structures), unconstitutionally denies these taxpayers the equal protection of the laws that is guaranteed to them by the Fourteenth Amendment by the United States Constitution and Art. 2 § § 3 and 18 of the Arkansas State Constitution, because such precasters' general contractor competitors are required to pay these Arkansas excise taxes only upon the value or cost of the "raw materials" purchased by them for incorporation into the components of similar permanent concrete structures that these general contractors pour "in place" on the job site in Arkansas.

3. The questions presented for decision by the Cross Motions for Summary Judgment in this action are ones of law, or mixed questions of fact and law, which questions relate to the imposition of Arkansas' Sales Taxes and Use Taxes by the Revenue Division of the DF&A. The issue involved is *not* one of a claimed exemption from Arkansas' Sales Taxes or Use Taxes by the precasters of permanent concrete structures. Therefore, as the Arkansas Supreme Court has consistently held, the burden of proof is upon the State of Arkansas to prove that the interpretative administrative policy adopted by the Revenue Division for imposing Arkansas Sales Taxes and Use Taxes upon the sales by the precasters of specially designed and engineered components of precast concrete structures that are permanently attached to real property in Arkansas meets the intent of the Arkansas General Assembly in imposing both the Sales Taxes and Use Taxes in question. If the Court finds there is any doubt or ambiguity as to

whether the excise taxes in question are intended to cover the transactions in dispute, then such doubt must be resolved against the taxing authority and in favor of the taxpayers. *Commissioner v. Arkansas Hwy. Comm.*, 232 Ark. 255, 337 S.W.2d 665 (1960); *Georgia Pacific Corporation v. Larey*, 242 Ark. 428, 413 S.W.2d 868 (1967); and *Ragland v. Meadowbrook Country Club*, 300 Ark. 164, 777 S.W.2d 852 (1969).

4. The Court takes judicial notice of the fact that the precasting of concrete structures is a technological development that has occurred since 1949. Therefore, the Court believes that the Arkansas General Assembly's intent in this regard should be drawn from recent legislative amendments to Arkansas' Sales Tax and Use Tax laws regarding off-site construction methods.

5. In this regard, the Court notes that the Arkansas General Assembly, by the adoption of Act 1068 of 1985 (Ark. Stat. Ann. § 84-1936.1 - 1936.4 [§ 26-52-801 - 804], and Ark. Stat. Ann. § 84-3106.1 [§ 26-53-118] (Stip. ¶ 13, Ex. 9)) has indicated its "legislative intent" that the manufacturers of "custom manufactured homes" (who prefabricate houses in factories) are to be considered "contractors" and the sale of the "completed" custom manufactured home will not be subject to the imposition of further Sales Tax or Use Taxes, if the "raw materials" incorporated into these prefabricated houses are subjected to either Arkansas' Sales Taxes or Use Taxes when they are purchased for incorporation into the prefabricated houses. The Court finds that there is a great deal of similarity between the prefabricating of houses in factories and the precasting of prestressed specially designed and engineered concrete structures that are permanently attached to real estate in the State of Arkansas. If the Arkansas General Assembly intends for the builders of houses in factories to be put on the same competitive tax plane with the builders of houses "on site," it would appear to this Court that the Arkansas General Assembly would also intend to place the precasters of large specially designed one-of-a-kind concrete structures that are permanently attached to real estate in Arkansas on the same competitive tax plane as are general contractors who construct the components of similar specially designed and engineered permanent concrete

structures by pouring the components of such structures "in place" on the Arkansas construction site.

6. Of even more direct relevance to the question presented by the precasters in this "illegal exaction" case is the recent action by the 76th Arkansas General Assembly when it passed House Bill 1716 of 1987 (Stip. ¶ 13, Ex. 7) by a majority vote of both the House of Representatives and the Senate. H.B. 1716 was adopted by the Arkansas General Assembly to amend Act 1068 of 1985 to specifically clarify the intent of the General Assembly that Arkansas' Sales Taxes and Use Taxes were to be applied *only* to the costs of raw materials purchased by precasters and incorporated into the component parts of specially designed one-of-a-kind concrete structures that were intended to be permanently affixed to real property in Arkansas. The Arkansas General Assembly clearly indicated that it intended for "off-site" precasters and "on-site" general contractors to be treated exactly the same for purposes of these Sales Taxes and Use Taxes. This clarifying legislation would have become law, save and except for the veto action taken by Governor Clinton (Stip. ¶ 14, Ex. 8) to stop the effective adoption of H.B. 1716 of 1987 by the Arkansas General Assembly.

7. The Court notes that the Governor, the head of the Executive Branch of Arkansas' government, took this veto action while Featherlite's protest was pending administratively before the Revenue Division of DF&A, and that it is this same Executive Branch of Arkansas' state government that is attempting to impose Arkansas' Sales Taxes or Use Taxes upon the full "plant price" or "contract price," plus hauling charges, with regard to the sales by all precasters of concrete structures. Thus, the Court concludes that the General Assembly has strongly indicated its intention that this new technological method of precasting buildings or other concrete structures that are to be permanently attached to real property is to have Arkansas Sales Tax and Use Tax imposed upon the sale of such structures, in the same manner as the "on-site" builders (i.e. general contractors) of such buildings or concrete structures are taxed on the purchases they make in constructing similar permanent concrete structures in Arkansas.

8. The Court also notes that the Arkansas General Assembly clearly stated in its adoption of Arkansas Compensating Tax Act (Act 487 of 1949), in the Emergency Clause to that Act (§ 31) that the Legislature intended that –

> The enactment of the Arkansas Retail Sales Tax Act, Arkansas has been placed in the peculiar category of discriminating against its home merchants. This Act attempts to rectify the evil by placing domestic merchants upon an equal plane with foreign merchants. [1]

9. The Arkansas Supreme Court, in its decision in the case of *Cheney v. Georgia-Pacific Paper Corp.*, 237 Ark. 161, at 167, 371 S.W.2d 843 (1963), in interpreting Arkansas' Use Tax statutes, set forth what factors a court should consider in determining the General Assembly's intent for adopting the Compensating (Use) Tax, as follows:

> In construing the legislative intent, we not only look at the language of the statute, but the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the contemporaneous legislative history or other appropriate matters that throw light on the intent of the Legislature.

10. Without question, it is clear to this Court that the Arkansas General Assembly intended to place all similarly situated taxpayers on an equal plane for purposes of imposing both Arkansas' Sales Taxes and Use Taxes, so as not to give any competitive advantage to one entity over another solely because of the imposition of these excise taxes.

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[1] The Emergency Clause (§ 31) to Act 487 of 1949 is found in the annotations to Ark. Stat. Ann. § 84-3128 (1980 Rev.).

11. The Court concludes that the DF&A's interpretative administrative policy of requiring precasters of specially designed one-of-a-kind concrete structures that are permanently attached to real property in Arkansas (whether these precasters' plants are located within or without the State of Arkansas) to charge and remit Arkansas Sales Taxes or Use Taxes based upon the full "plant price" or "contract price," plus hauling services, is an improper and unconstitutional interpretation of these excise tax statutes. This administrative policy violates both the Commerce Clause and the Equal Protection Clause of the Federal Constitution and the Equal Protection Clauses of Arkansas' State Constitution, because the Revenue Division requires that the precaster's general contractor or specialty subcontractor competitor, who pours the same component parts of concrete structures "in-place" on the Arkansas job site, pay or remit Arkansas' Sales Taxes or Use Taxes *only* upon the cost or value of the "raw materials" incorporated into such permanent concrete structures, with no excise taxes being imposed upon the labor or construction services rendered in completing such permanent concrete structures.

12. The Revenue Division's assertion that this Court should only compare the sales of all precasters (whether their plants are located within or without the State of Arkansas), and that the Court should not compare these sales by precasters to sales by general contractors who construct similar permanent concrete structures (e.g. warehouses, parking decks, bridges, etc.) on job sites in Arkansas, is impractical and illogical. All precasters, using technologically improved construction methods, are competing with their general contractor-customers in providing the developer of real property projects with permanent concrete structures that are affixed to real property in Arkansas. In fact, Featherlite, the class representative, acted as a subcontractor in many instances in providing such permanent concrete structures on site in Arkansas. Therefore, the Court concludes that it should not make any difference whether the subcontractor poured the components of the permanent concrete structure "off site" and erected such structures on the job site in Arkansas, or whether the subcontractor poured the components of such permanent concrete structures "in place" in forms located on the Arkansas job site. In both instances, the

end result is the same, i.e. a large specially designed and engineered concrete structure is produced and permanently attached to real property in Arkansas, and the business entities constructing such permanent concrete structures should be placed on the same competitive tax plane.

13. Both parties cite this Court to the Arkansas Supreme Court's decision in the case of *Republic Steel Corporation v. McCastlain*, 240 Ark. 979, 403 S.W.2d 90 (1966) as support for their respective legal positions. Featherlite, as the representative of the Plaintiff-class of taxpayers, maintains that the *Republic Steel* decision stands for the principle that all similarly situated businesses (whether they are located within or without the State of Arkansas) should be placed on an even tax plane for competitive purposes. The Arkansas Revenue Division cites the *Republic Steel* decision as support for its position that the excise taxes in question should be imposed upon the cast of "finished product," not the case of the "raw materials" used in constructing precast concrete structures that are permanently attached to real property in Arkansas.

14. The Court finds, upon careful reading of the Arkansas Supreme Court's decision in the *Republic Steel* case, that the Arkansas Revenue Division's interpretation is too "simplistic" or "technical," and that the representative Plaintiff's interpretation of the *Republic Steel* decision adopts or states the real rationale set forth there by the Arkansas Supreme Court. Our Supreme Court, in its *Republic Steel* decision, cited with approval the rationale of the United States Supreme Court in its decision in *Halliburton Oil Well Service Co., Inc. v. Reilly*, 373 U.S. 64 (1963). This *Halliburton* decision held that the purpose of the Sales-Use statutory tax scheme was to make all tangible personal property used or consumed in a state subject to a uniform tax burden, at the same rate, irrespective of whether the property was acquired within or without the state. The Arkansas Supreme Court specifically acknowledged this *Halliburton* rationale in its subsequent decision in *Larey v. Continental Southern Lines, Inc.*, 243 Ark. 278, at 284, 419 S.W.2d 610 at 614 (1967), where the Court acknowledged that tax equality, for purposes of competition and the flow of

commerce, must be measured in dollars and cents, not legal abstractions. The Court specifically held:

> It has also been held that equal treatment for in-state and out-of-state tax payers is a condition precedent to valid use taxes on imported goods. *Halliburton Oil Well Co., Inc. v. Reilly, supra.*

15. It is undisputed that the cost or value of the "raw materials" that a precaster incorporates into the components of these large specially designed one-of-a-kind concrete structures represents anywhere from 10% to 40% of the total "plant price" for such structures, and that the balance of the "plant price" is made up of labor charges, design charges, overhead administrative charges, and profit. The example set out in the Plaintiff's Brief in Support of its Motion for Summary Judgment (pp. 56-57) clearly establishes that the Arkansas Revenue Division's interpretive administrative policy places out-of-state precasters of concrete structures at a competitive disadvantage of up to 3% of the total contract price when compared to their "on-site" general contractor competitor's similar Sales Tax or Use Tax treatment or cost in providing a large permanent concrete structure on an Arkansas building site. This example is illustrated by comparing the excise tax cost for two similar concrete parking decks (each costing a total of $2.0 million with the cost of "raw materials" being 25% of this total cost), as set out below:

EXCISE TAX COMPUTATION

Type of Construction Method Utilized	Tax Base Determined By Rev. Div. Policy	Tax Rate	Sales or Use Tax Imposed
"Off-Site" Precasting	$2,000,000	4%	$ 80,000

"On-Site" Pouring	$ 500,000	4%	$ 20,000
	Difference		$ 60,000 [2]

Thus, when measuring the tax costs of these similarly situated competitors in terms of "dollars and cents," not in terms of legal abstractions, the reporting method adopted by Featherlite is imminently more logical and rational than that imposed upon Featherlite on audit by the Arkansas Revenue Division. [3]

16. The Court also concludes that the Arkansas Revenue Division's interpretive administrative policy of imposing Use Tax upon the "full plant price," plus "hauling charges," of an out-of-state located precaster (like Featherlite) when such out-of-state located precaster is acting as a subcontractor in providing a fully erected permanent concrete structure in Arkansas, when compared to the Arkansas Revenue Division's tax treatment of the "on-site" general contractor who is providing a similar concrete structure by pouring it "in-place" on the Arkansas job site, fails to pass the United States Supreme Court's prohibition against discriminatory taxes imposed against those engaged in interstate commerce, as set forth in the third prong of the four prong test devised in that Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which four prong test was acknowledged and adopted

---

[2] The "difference" in the Sales or Use Tax cost attributable to these concrete structures in this example represents 3% of the overall cost of the entire concrete parking deck.

[3] The Court notes that the Revenue Division has not, in any way, disputed the testimony of Featherlite's Vice-President for Finance, Robert T. Dolson, that Featherlite's method of reporting Arkansas' Use Taxes is the method accepted by the States of Texas, Louisiana, and Tennessee, for purposes of reporting similar Sales Taxes and Use Taxes on sales of precast concrete structures in those states.

by the Arkansas Supreme Court in its decision in *Burlington Northern R.R. Co. v. Ragland*, 280 Ark. 182, 655 S.W.2d 437 (1983).

17. This Court notes that the Louisiana Supreme Court, in a case involving very similar factual circumstances (i.e. where the out-of-state fabricator of large oil storage tanks fabricated the sections of such tanks out-of-state and then assembled them on the job site within Louisiana) held in its decision in *Chicago Bridge & Iron Co. v. Cocreham*, 317 So.2d 605 (La., 1975), based primarily upon the United States Supreme Court's rationale in the prior *Halliburton* case, that the State of Louisiana was required to impose Louisiana's Sales Taxes and Use Taxes *only* upon the costs of raw materials used to construct such large storage tanks, and *not* upon the full contract price, plus the transportation costs, because in-state general contractors were required to pay Louisiana Sales Tax *only* upon the cost of raw materials incorporated into such storage tanks. It is noted by this Court that the Louisiana Supreme Court specifically excluded from the tax base the transportation or freight costs incurred in moving the completed components of the storage tank to the erection site. Subsequently, an intermediate appellate court in the State of Louisiana has adopted the same rationale in its decision in *Dow Chemical Company v. Triangle*, 336 So.2d 285 (Ct. App. La., 1976).

18. As noted by the Louisiana Supreme Court in the *Chicago Bridge & Iron* decision, the Louisiana Revenue Department's position could have been sustained on a "literal reading" of the statutory provision in question there (which statute is similar to Arkansas' Sales Tax statute). However, the Louisiana Supreme Court chose to give a "practical interpretation" to the Louisiana tax statute and found that the state's Sales Taxes and Use Taxes should be imposed *only* upon the cost of the raw materials incorporated into a permanent structure, such as a large oil storage facility, so as to place similarly situated taxpayers on an even plane for competitive purposes. Here, the Arkansas Revenue Division similarly attempts to make a "literal reading" of the provisions of Ark. Stat. Ann. § 84-1902(d) [§ 26-52-103(4)] controlling in saying that Arkansas' Sales Tax or Use Tax should be imposed upon the

total "gross receipts" or "gross proceeds" received by precasters, because such terms are defined as

> "the total amount of consideration received from the sale of tangible personal property...without any deduction thereon on account of the cost of the properties sold, labor services performed, interest paid, losses or any expenses whatsoever...."

19. Arkansas' statutory scheme for imposing Sales Taxes and Use Taxes is to impose such excise taxes upon the sales price of all tangible personal property (unless specifically exempted by statute), while only a few enumerated services are specifically subjected to these same excise taxes. In fact, the definition of the term "sale" in Ark. Stat. Ann. § 84-1902(c) [§ 26-52-103(3)] specifically states:

> The term "sale" shall *not* include the furnishing or rendering of services, *except as herein otherwise provided*. (Emphasis Supplied)

The construction services or labor, or transportation services, are *not* among the "taxable services" specifically enumerated in Ark. Stat. Ann. § 84-1903 [§ 26-52-301(3)], as being "taxable" services. Therefore, the Arkansas Supreme Court has recently held in a case dealing with this specific question, *Ragland v. Meadowbrook Country Club, supra*, that the burden of proof is upon the Revenue Division to establish that the Arkansas General Assembly intended to impose Arkansas' Sales Taxes and Use Taxes upon charges for otherwise nontaxable services when these services were billed along with the sale of "taxable" tangible personal property. This Court finds that the Revenue Division has failed to carry its burden of proof in this regard in this "illegal exaction" case.

20. In another recent decision by the Arkansas Supreme Court, involving an analogous fact situation, *Ragland v. Dumas*, 292 Ark. 515, 732 S.W.2d 118 (1987), the Arkansas Supreme Court refused to impose the state's Sales Taxes upon the total charges made by a contractor who provided certain tangible

personal property (gravel) to his customers in completing his contractual obligations of preparing oil well sites. In that case, the Arkansas Revenue Division had tried to maximize the state's flow of revenue by improperly and illegally increasing the Sales Tax base by 1000% over the stipulated value of the tangible personal property (gravel) that was provided by the taxpayer. Here, this same situation exists that was presented in the *Dumas* case, since the cost of the "raw materials" incorporated into the components of a permanent concrete structure represent approximately only 25% of the overall "plant price" charged by Featherlite and other precasters to their Arkansas customers. Thus, here, the Revenue Division's interpretive policy is increasing the excise tax base by over 400%, as compared to the same excise tax burden being imposed upon an "on-site" general contractor or specialty subcontractor that pours the components of these permanent concrete structures "in-place" on the Arkansas job site.

21. Since Featherlite was a licensed contractor acting as a subcontractor in constructing the permanent concrete structures on the job sites in Arkansas, the Court concludes that the Revenue Division's administrative interpretation in this instance is also refuted by its own Gross Receipts Tax and Compensating (Use) Tax Regulations. Regulation GR-3-G provides -

> Consumer: The term "consumer" is synonymous with "user" or "customer" or "purchaser" and means the person to whom a taxable sale is made, or to whom taxable services are furnished or a person who consumes tangible personal property of services. Contractors are deemed to be the consumers of all tangible personal property or taxable services purchased by them in the performance of a contract.

Further, Regulation GR-3-L provides -

> The term "contractor" shall mean any person who contracts or undertakes to construct, manage or supervise the construction, erection or substantial

> modification of any building or other improvement or structure affixed to real property.

Regulation GR-21 provides, in part, with regard to contractors that

> A person who performed services as a contractor in connection with a construction, erection, or substantial modification of any building or other improvement or structure affixed to real property (including finished work for tenants of structures) will not collect the tax on such contracting services.

Finally, Regulation GR-18-C specifically provides that -

> Installation charges: If a seller is engaged in the established business of selling and installing tangible personal property in Arkansas, and the sales price of the property includes the installation charges as a part of the total sales price, the Gross Receipts Tax should be collected on the total sales price. *If the installation charges are separately stated on the invoice or bill of sale, tax is not due on the separate installation charge*. (Emphasis Supplied)

There is no specific statutory authorization in the Gross Receipts Tax Act to authorize such a Regulation as GR 18-C. However, the Compensating Tax Act, Ark. Code Ann. § 26-53-102(1) specifically provides that the term "sales price" shall *not* include the installation charges. Therefore, to place similarly situated in-state vendors on an equal excise tax plane with out-of-state vendors, by regulation, the Arkansas Revenue Division has ruled that and separately stated charges for "installation services" will be excluded from the Sales Tax base. Exactly the same rationale could be adopted by the Arkansas Revenue Division with regard to charges for "construction services" and "transportation services"

performed by precasters of permanent concrete structures when such services are performed in the precasters' plant yards away from the Arkansas job site or between these yards and the Arkansas job site.

22. The Revenue Division argues, alternatively, that the "hauling charges" or "transportation charges" charged by third party ICC regulated carriers (which charges are separately stated on Featherlite's invoices) for transporting the "completed" components of the permanent concrete structure from Featherlite's plant yard in Memphis, Tennessee, to the Arkansas job site should be included in the Sales Tax or Use Tax base. This position is taken by the DF&A because of the Arkansas Supreme Court's decision in *Belvedere Sand & Gravel Co. v. Heath*, 259 Ark. 767, 536 S.W.2d 312 (1936), which decision held that the "gross receipts" received by the seller for gravel delivered to the purchaser, "FOB job site," included the transportation charges in the "gross receipts" or "gross proceeds" derived from the sale of the tangible personal property (i.e. gravel). Though at first reading the *Belvedere Sand & Gravel* decision would seem to be controlling, this Court finds, upon careful analysis of the facts presented in this "illegal exaction" case, that the facts in this case are distinguishable from those presented in the *Belvedere Sand & Gravel* case. Here, there is absolutely no showing by the Arkansas Revenue Division that the precaster's "on-site" general contractor competitors incurred "extra" transportation charges in the purchase of their raw materials used in the construction of the permanent concrete structures that are poured "in place" on the Arkansas job site. In the stipulation, the Arkansas Revenue Division acknowledges that the separately stated charges for "erection services" by the precaster on the job site are *not* subject to Arkansas' Sales Taxes or Use Taxes. It is also undisputed that the "transportation charges" involved here are ones that are incurred *after* the components of the specially designed and engineered one-of-a-kind concrete structures are completed at the precaster's plant site. Therefore, this Court finds that these particular "hauling charges" incurred to transport the completed components of the permanent concrete structures from Featherlite's Memphis plant site to the various Arkansas job sites are analogous to the charges for "erection services" that are specifically deemed

to be nontaxable service charges. The Court notes that the Louisiana Supreme Court in its decision in *Chicago Bridge & Iron, supra*, specifically held that these same charges for "transportation services" were *not* to be included in the Sales Tax or Use Tax base for purposes of computing the "off-site" fabricator's Use Tax liability. It is also noted that the precaster and the general contractor would have both paid Sales Taxes or Use Taxes on any transportation charges, added to the cost of delivering the "raw materials" to the precasters' plant or the general contractor's job site. Thus, under the rationale of the *Belvedere Sand and Gravel* case, both the precasters and their general contractor competitors would be treated the same by being placed upon an equal tax plane for excise tax imposition purposes.

24. Therefore, the Court concludes that the charges for "hauling services" incurred by precasters for the delivery of the completed components of the large specially designed concrete structure that are permanently attached to real property at the Arkansas job sites should be treated the same as the nontaxable "erection services" are treated by the Arkansas Revenue Division. This conclusion is based upon the fact that "transportation charges" are "excluded" from the list of taxable services set out in Ark. Code Ann. § 26-52-301(3), and the elimination of these charges for "transportation services" from the Arkansas Sales Tax base places all precasters and all of their general contractor or specialty subcontractor competitors on an equal plane for Sales Tax and Use Tax purposes.

25. The Arkansas Supreme Court stated in the case of *Hervey v. Southern Wooden Box, Inc.*, 253 Ark. 290, 486 S.W.2d 66 (1972), in commenting on the definition of the term "sale" for Sales Tax purposes, that —

> The broad statutory definition of sale does not include every transaction in which there was a transfer of possession for consideration. This statute must be read as a whole, if the reference to a transfer of possession is applied literally, in every instance, absurd results will follow.

The Court concludes that the Arkansas Revenue Division's challenged interpretative administrative policy of imposing Arkansas' Sales Tax and Use Tax upon the full "plant price" or "contract price," plus charges for hauling services, upon the sales of component parts of specially designed one-of-a-kind concrete structures by precasters (whether their plants are located within or without the State of Arkansas), as opposed to imposing such excise taxes *only* upon the cost or value of the raw materials incorporated into such component parts of permanent concrete structures, causes the precasters of such permanent concrete structures to be placed at a real competitive disadvantage, compared to the excise tax treatment afforded by the Arkansas Revenue Division to these precasters "on-site" general contractor or specialty subcontractor competitors. As analyzed above, the Arkansas Revenue Division's administrative policy of attempting to "literally" apply the definitions of "gross proceeds" and "gross receipts" and "sales price," in this instance, ends in an absurd result.

26. The Court concludes that the reporting method adopted by Featherlite in imposing and remitting Arkansas' Sales Taxes and Use Taxes upon the value of the "raw materials" (e.g. sand, gravel, cement, reinforcing steel, etc.) utilized in the construction of the component parts of a permanent structure produced "off of the job site" by a precaster (whether the precaster's plant is located within or without the State of Arkansas) places all precasters on an equal and even excise tax plane with *all* of their general contractor and specialty subcontractor competitors in the measurement of dollars and cents for these similarly situated taxpayers. Accordingly, the Court concludes that the Revenue Division's administrative interpretation that is attacked by Featherlite is unconstitutional because it violates both the provisions of the Commerce Clause and Equal Protection Clause of the Federal and State Constitutions. There is no rational basis for this interpretative policy, and it is, therefore, declared to be invalid.

27. Any finding of fact deemed to be a conclusion of law is hereby adopted as a conclusion of law.

28. Therefore, the Court concludes that Featherlite is

entitled to recover from the Defendant the total amount of $143,288.54 in Arkansas Use Tax, plus $52,555.87 in interest, that the corporate taxpayer has paid, "under protest," plus accrued interest as provided by law from the date of payment of such amounts. Additionally, the representative of the Plaintiff-class is hereby authorized to conduct an accounting and to ascertain the amount of "excess" Arkansas Sales Taxes and Arkansas Use Taxes that have been collected by Defendant Pledger and the personnel of the Arkansas Revenue Division from precasters of concrete structures sold and installed in Arkansas (for which such excise taxes were remitted to Defendant Pledger and his agents after August 24, 1989), because of the erroneous and illegal administrative policy adopted by the Arkansas Revenue Division for imposing such excise taxes upon the sales of the component parts of such permanent concrete structures that these precasters have collected and remitted to the State of Arkansas since August 24, 1989.

29. This Court shall retain jurisdiction over this case for the purpose of overseeing this accounting, the establishment of a "common fund" composed of the "excess" Sales Taxes and Use Taxes collected by Defendant Pledger from the members of the Plaintiff-class since August 24, 1989, for purposes of overseeing the implementation of a refund to those taxpayers entitled to such refunds, and for the payment of administrative costs, including the awarding of a portion of this "common fund" as an attorneys' fee to the solicitor representing the Plaintiff-class.

Entered this 31st day of December, 1990.

/s/ John C. Earl
Honorable John C. Earl
Chancellor

APPENDIX D
(Stip. Ex. 9 R. 248-249)
ACT 1068 of 1985

A Bill

State of Arkansas HOUSE BILL 59
75th General Assembly
Regular Session, 1985
By: Representative Willems and King
AS ENGROSSED 1/28/85 AS ENGROSSED 3/18/85

For An Act To Be Entitled

"AN ACT TO PROVIDE THAT MANUFACTURERS OF CUSTOM MANUFACTURED HOMES SHALL BE TREATED AS CONTRACTORS FOR THE PURPOSE OF THE ARKANSAS GROSS RECEIPTS (TAX) ACT AND COMPENSATING (USE) TAX ACT; TO EXEMPT NEW CUSTOM MANUFACTURED HOMES FROM SALES AND USE TAX; AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. For the purposes of this Act, the term "custom manufactured home" means a factory-built structure made to be moved to a location away from the factory by a conveyance which is not a part of the structure and which structure is designed to be used as a dwelling unit with a permanent foundation. For the purpose of this definition the phrase "with a permanent foundation" means the support system of the home is constructed so that the custom manufactured home may not be moved without a supporting frame or chassis being added to or placed under the structure. The term custom manufactured home does not include a mobile home as defined at Ark. Stat. Ann. Section 82-3002(g).

[Now codified as Ark. Code Ann. § 26-52-801]

SECTION 2. Manufacturers of custom manufactured homes shall be considered contractors within the meaning of Ark. Stat. Ann. Section 84-1902(5).

[Now codified as Ark. Code Ann. § 26-52-802]

SECTION 3. Gross receipts from the sale of new custom manufactured homes constructed from materials on which the Arkansas Gross Receipts Tax or Arkansas Compensating (Use) Tax has been paid shall be exempt from Arkansas Gross Receipts (Sales) Tax.

[Now codified as Ark. Code Ann. § 26-52-803]

SECTION 4. The storage, use or consumption of custom manufactured homes constructed from materials on which the Arkansas Gross Receipts Tax or Arkansas Compensating (Use) Tax has once been paid shall be exempt from Arkansas Compensating (Use) Tax.

[Now codified as Ark. Code Ann. § 26-53-118]

SECTION 5. It is not the intent of this Act and nothing contained herein shall be construed to exempt from the Arkansas Gross Receipts Tax or the Arkansas Compensating Tax furniture, appliances or other furnishings installed or placed in custom manufactured homes by the manufacturer of such homes.

[Now codified as Ark. Code Ann. § 26-52-804]

SECTION 6. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, into this end the provisions of this Act are declared to be severable.

SECTION 7. All laws and parts of laws in conflict with this Act are hereby repealed.

/s/ Frank J. Willems

/s/ Winston Bryant
President of Senate

/s/ H. Lacy Landers
Speaker of the House

APPROVED BY
/s/ Bill Clinton
GOVERNOR
4/17/85

APPENDIX E

(Stip. Ex. 7, R. 243–244)

A Bill

State of Arkansas
76th General Assembly
Regular Session, 1987
By: Representative M. Wilson

HOUSE BILL 1716

AS ENGROSSED 3/6/87 *AS ENGROSSED 4/1/87*

For An Act To Be Entitled

"AN ACT TO AMEND ACT 1068 OF 1985 TO CLARIFY THE APPLICABILITY OF THE ARKANSAS GROSS RECEIPTS (SALES) TAX ACT AND THE COMPENSATING (USE) TAX ACT TO MANUFACTURED CONCRETE STRUCTURES; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. PURPOSE. The purpose of this Act is to make technical and clarifying amendments to Act 1068 of 1985, to clearly state that it is the intent of the General Assembly that the Gross Receipts (Sales) Tax and the Compensating (Use) Tax are to be imposed only upon the cost of raw materials used in "manufactured" concrete buildings and structures, in the same manner as the Gross Receipts (Sales) Taxes and Compensating (Use) Taxes are imposed only upon the cost of raw materials used in the "on-site" construction of concrete buildings and structures.

SECTION 2. Section 1 of Act 1068 of 1985, the same being Ark. Stat. Ann. § 84-1936.1, is hereby amended to read as follows:

"Section 1. DEFINITIONS. (a) Custom Manufactured Home. For the purposes of this Act, the term 'custom manufac-

tured home' means a factory-built structure made to be moved to a location away from the factory by a conveyance which is not a part of the structure and which structure is designed to be used as a dwelling unit with a permanent foundation. For the purpose of this definition, the phrase 'with a permanent foundation' means the support system of the home is constructed so that the custom manufactured home may not be moved without a supporting frame or chassis being added to or placed under the structure. The term custom manufactured home does not include a mobile home as defined in Ark. Stat. Ann. § 82-3002(g).

(b) Manufactured Concrete Structures. For purposes of this Act, the term 'manufactured concrete structures' means the manufactured concrete components or panels of a permanent building or structure that are specifically designed to be precast in units weighing more than 1,000 pounds each and then permanently attached to real property. Such specially designed components are those that are constructed at a manufacturing location away from the erection site and then moved from the manufacturing location to the site where the structure is being erected by a conveyance which is not part of the structure. For purposes of illustration, but not limitation, such concrete structures shall include concrete components or panels of buildings, parking decks, bridges, etc., but the term 'concrete structures' shall not be interpreted to include concrete blocks, bricks or other such concrete building materials that individually weigh less than 1,000 pounds each, or single preformed concrete structures (e.g. septic tanks) that weight less than 4,000 pounds each.

SECTION 3. Section 3 of Act 1068 of 1985, the same being Ark. Stat. Ann., § 84-1936.3, is hereby amended to read as follows:

"Section 3. Gross receipts realized from the sale of new custom manufactured homes or manufactured concrete structures constructed from materials on which the Arkansas Gross Receipts (Sales) Tax or the Arkansas Compensating (Use) Tax has once been paid shall be exempt from the Arkansas Gross Receipts (Sales) Tax."

SECTION 4. Section 4 of Act 1068 of 1985, the same

being Ark. Stat. Ann. § 84-3106.1, is hereby amended to read as follows:

"Section 4. The storage, use or consumption of custom manufactured homes or manufactured concrete structures constructed from materials on which the Arkansas Gross Receipts (Sales) Tax or Arkansas Compensating (Use) Tax has once been paid shall be exempt from the Arkansas Compensating (Use) Tax."

SECTION 5. SEVERABILITY. If any provision to this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provisions or applications, and to that extent, the provisions of this Act are declared to be severable.

SECTION 6. REPEALER. All laws and parts of laws in conflict with this Act are hereby repealed.

/s/ Mike Wilson

(Stip. Ex. 8, R. 246)

STATE OF ARKANSAS
OFFICE OF THE GOVERNOR
State Capitol — *Bill Clinton*
Little Rock 72201 — Governor

April 8, 1987

TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES:

Dear Mr. Speaker:

This is to inform you that I have disapproved House Bill 1716 for the following reasons:

House Bill 1716 would exempt certain manufactured concrete structures from the imposition of the Gross Receipts Tax and the Compensating Use Tax. Enactment of this legislation would result in a decrease in state revenue collections. Because of the very difficult financial situation facing the State of Arkansas, I have determined that I must disapprove this bill.

Sincerely,

/s/ Bill Clinton
Bill Clinton
Governor

(2)

91-1974

No. 91-1976

Supreme Court, U.S.
FILED
JUL 7 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FEATHERLITE PRECAST CORPORATION ..... *Petitioner*

vs.

JAMES C. PLEDGER, DIRECTOR,
DEPARTMENT OF FINANCE AND
ADMINISTRATION, STATE OF ARKANSAS,
and JIMMIELOU FISHER LUMPKIN,
TREASURER OF THE STATE OF ARKANSAS ..... *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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ARKANSAS LEGISLATIVE DIGEST, INC

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No. 91-1976

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

FEATHERLITE PRECAST CORPORATION ..... *Petitioner*

vs.

JAMES C. PLEDGER, DIRECTOR,
DEPARTMENT OF FINANCE AND
ADMINISTRATION, STATE OF ARKANSAS,
and JIMMIELOU FISHER LUMPKIN,
TREASURER OF THE STATE OF ARKANSAS ..... *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Respondents respectfully request that this Court deny Petitioner's petition for writ of certiorari seeking review of the opinion of the Arkansas Supreme Court.

REASONS FOR DENYING THE PETITION

The Arkansas Supreme Court's decision in this case does not conflict with any decision of this Court or any other state appellate court. The court correctly held that the Arkansas Revenue Division's interpretation of the Arkansas sales and use taxes conforms to the requirements of both the Commerce Clause and Equal Protection Clause.

Petitioner, an out-of-state producer of precast concrete components (commonly referred to as a "precaster"), challenged a use tax assessment contending that the tax should have been calculated based upon the cost of raw materials used in producing the components, rather than upon the "sales price" of the finished component. The tax was assessed based upon the "sales price" of the finished component because the component produced was "tangible personal property," and sales and use tax are calculated based upon the "sales price" of tangible personal property. Regardless of whether the precast concrete component is made within the state or without, the same amount of tax is due.

Petitioner predicates his argument upon the presumption that the precasters are in competition with contractors who build structures on-site similar to those made from the precast concrete components. Contractors are deemed to be the consumer of all materials used in construction and therefore pay tax on the "sales price" of all materials used in the construction. If the contractor pours the structure "on-site" then the tax is calculated based upon the "sales price" of the cement, sand, gravel, etc. used in building the structure. If the contractor uses precast concrete components, then the tax is calculated based upon the "sales price" of the precast concrete components, regardless of whether he subcontracts with the precaster-vendor to erect those components. The

precasters provide the subcontractors with a product, precast concrete components, and in some instances provide the contractor with a service, the erection of those components. Precasters do not compete with the contractors. They work on different market levels.

The Arkansas Supreme Court correctly concluded that the application of the sales and use tax in this case conforms with the requirements of both the Equal Protection Clause and the Commerce Clause. All precasters within the state and without are taxed identically. All contractors within the state and without are taxed identically. Precasters do not compete with contractors. Therefore, the Petition for a Writ of Certiorari in this case should be denied.

I.

THE ARKANSAS SUPREME COURT PROPERLY APPLIED THE COMMERCE CLAUSE IN THIS CASE, FINDING THAT THE ARKANSAS SALES AND USE TAXES ARE EQUALLY APPLIED TO IN-STATE AND OUT-OF-STATE TAXPAYERS WHO ARE SIMILARLY SITUATED.

A. Equality of Taxation.

The determination of whether a tax unconstitutionally burdens interstate commerce can be distilled to one question. Does the tax afford equal treatment for in-state and out-of-state taxpayers who are similarly situated? ***Halliburton Oil Well Cementing Co. v. Reily,*** 373 U.S. 64, (1963). The Petitioner admits that all producers of precast concrete components (commonly referred to as "precasters"), such as itself, are subject to a uniform tax burden regardless of

whether they reside within or without the State of Arkansas. (R. 38 and 195) Neither in-state nor out-of-state precasters have a tax advantage. The tax liability for precasters, whether located within the state or without, is calculated in the same manner, using the "sales price" of the concrete components. Arkansas sales and use taxes are equally applied to similarly situated in-state and out-of-state taxpayers.

Petitioner asserts that the taxpayers in this case who are "similarly situated" are the out-of-state construction contractors who use the "precast" method of construction and the in-state construction contractors who use the "poured in place" method of construction. However, Petitioner fails to mention that the in-state and out-of-state construction contractors who use the "precast" method of construction are taxed the same, and that the in-state and out-of-state construction contractors who use the "poured in place" method of construction are also taxed the same. (R. 195-196)

Petitioner has not challenged any statutory provision, but instead has challenged the taxing authority's "administrative practice." (Pet. 14 and 17) The Arkansas Supreme Court found that the Arkansas Revenue Division had correctly interpreted the statutes, noting:

> Appellee Featherlite admits that the Revenue Division's interpretation is literally correct, but urges us to hold that the General Assembly intends for the Division to use a more "flexible" interpretation. . . . But we need not consider other "flexible" interpretations because the statutes are not ambiguous and the Revenue Division's interpretation of them is in accordance with their plain and accepted meaning. (Pet. A. 10a)

Reciting the pertinent provisions of the applicable sales and use tax statutes[1], the Court sustained Respondent's

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[1]Ark. Code Ann. §26-52-301 (1987), in pertinent part, provides:

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

(1) *Tangible personal property;*

[Emphasis added.]

Ark. Code Ann. §26-52-103 (1987), in pertinent part, provides:

(a) The following words and phrases, except where the context clearly indicates a different meaning when used in this act, shall have the following meanings:

(3)(A) "Sale" is declared to mean the transfer of either the title or possession . . . for a valuable consideration of *tangible personal property*, regardless of the manner, method, instrumentality, or device by which the transfer is accomplished. [Emphasis added.]

• • •

(4) "Gross receipts" or "gross proceeds" means the total amount of consideration for the sale of tangible personal property . . . without any deduction on account of the cost of the properties sold, labor service performed, interest paid, losses, or any expenses whatsoever.

• • •

(7) "Seller" means every person making a sale in an established business as defined in this section;

• • •

(9) "Consumer" or "user" means the person to whom the taxable sale is made or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies, and equipment used or consumed by them in performing any contract, and the sale of all such property to contractors are taxable sales within the meaning of this act.

Ark. Code Ann. §26-52-307 (1987) provides:

Sales of service and tangible personal property including materials, supplies, and equipment made to contractors who use them in the performance of any contracts are declared to be sales to consumers or users and not sales for resale.

interpretation of those statutes and found that the sales and use tax due on the sale of precast concrete components is correctly calculated based upon the "sales price" charged, rather than the cost of the raw materials, since the concrete components are "tangible personal property."

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[1]Continued

Ark. Code Ann. §26-53-106(a) (1987) provides:

There is levied and there shall be collected from every person in this state a tax or excise for the privilege of storing, *using*, or consuming within this state any article of tangible personal property purchased for storage, use or consumption in this state at the rate of three percent (3%) of the sales price of the property. [Emphasis added.]

Ark. Code Ann. §26-53-102 (1987) in part provides:

As used in this subchapter, unless the context otherwise requires:

(1) "Sales price" means the consideration paid, or given . . . to the vendor for the article of the tangible personal property . . . without any deduction therefrom on account of the cost of the property sold, the costs of the materials used, labor or service cost, . . . or any other expenses whatsoever. . . .

(4) "Vendor" means and includes every person engaged in making sales of tangible personal property. . . .

(11) *"Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.* [Emphasis added.]

Ark. Code Ann. §26-53-201 (1987) provides:

As used in this subchapter, unless the context otherwise requires, "contractors" are consumers of all tangible personal property used or consumed in the performance of a contract in this state and of all tangible personal property stored for use or upon which the contractor may exercise any right or power in this state.

Ark. Code Ann. §26-53-203(a)(1) (1987) provides:

All tangible personal property which is procured from without this state for use, storage, or consumption including machinery, equipment, repair or replacement parts, materials, and supplies used, stored, or consumed by a contractor in the performance of a contract in this three percent (3%) of the purchase price as provided by the Arkansas Compensating Tax Act, §26-53-101 et seq. . . .

The tax due on the sale of precast concrete components is the same under all circumstances, regardless of whether sales or use tax is imposed. It makes no difference whether the general contractor purchases the precast concrete components and erects them himself, or hires the precaster, such as Petitioner, to erect them. The tax (sales or use) will be calculated based upon the "sales price" of the precast concrete components, less the separately stated erection charges, if any. (R. 195-196) The "sales price" is the correct basis to use for calculating the tax due because precast concrete components are "tangible personal property". Ark. Code Ann. §§26-52-301 and 26-53-106. The same amount of tax is due, regardless of where the seller or purchaser resides.

Unlike *Halliburton,* 373 U.S. 64 (1963), the tax in this case is not dependent upon whether the taxpayer resides within or without the state. In *Halliburton,* the out-of-state manufacturer-user was required to pay use tax based upon the "cost price" which included the labor and shop overhead costs, whereas the in-state manufacturer-user was only required to pay sales tax based upon the cost of the raw materials which was substantially less than the "cost price". The Louisiana Collector stipulated that had Halliburton assembled the equipment in Louisiana, the tax would have been calculated based upon the cost of the raw materials instead of the "cost price" of the finished product. Accordingly, this Court found that the Louisiana use tax unconstitutionally discriminated against interstate commerce. In the case at bar, the same amount of tax is due on the sale of a precast concrete component regardless of whether the purchaser or the seller resides within or without the State of Arkansas. Therefore, the *Halliburton* case is not analogous to this case.

B. *No Conflict With Decisions In Other States.*

The Arkansas Supreme Court decision in this case does

not conflict with any decision of the other state appellate courts including the Louisiana Supreme Court's decision in *Chicago Bridge and Iron Company v. Cocreham*, 317 So.2d 605 (La. 1975). Petitioner inaccurately portrays the facts of this case as being "virtually identical with and indistinguishable from" the facts in *Chicago Bridge and Iron.* (Pet. 20)

Chicago Bridge and Iron (CBI) was an Illinois corporation doing business in Louisiana constructing steel storage tanks which were assembled on foundations at the job site. CBI fabricated the steel plate components of the storage tanks at its out-of-state shops and transported them to the Louisiana job sites. Louisiana assessed the use tax due on the "cost price" of the fabricated steel plates, which included not only the cost of the steel plate but also the labor and shop overhead costs incurred in the out-of-state fabrication.

The question before the Louisiana Supreme Court was as follows:

> The narrow question we are here considering is whether under Louisiana law the in-state purchaser who, in performing his construction contracts, in part fabricates or manufactures off-site at his in-state plant, is required to pay, in addition to the sales tax on the raw materials purchased, in-state, a use tax on the labor and shop overhead which goes into fabrication of such equipment. *Chicago Bridge and Iron*, 317 So.2d at 610.

Based upon the Louisiana Collector's stipulation in the *Halliburton* case that neither sales nor use tax would be due upon the in-state labor or shop overhead, the Louisiana Supreme Court found that "the use tax is imposed upon labor and shop overhead of the out of state manufacturer-user and that neither sales nor use tax is imposed upon the in-state

manufacturer-user," and concluded that the application of the use tax to labor and shop overhead of the out-of-state manufacturer-user is unconstitutional because it violates the Commerce Clause of the United States Constitution. *Chicago Bridge and Iron*, 317 So.2d at 612.

Unlike CBI, Petitioner in this case is on equal footing with his in-state competitors, the in-state producers of precast concrete components. Whereas CBI's in-state competitors who fabricated the steel plate components off-site had a lower taxable base (the cost of the raw materials as opposed to the enhanced value or "cost price"), Petitioner's in-state competitors who produce the precast concrete components off-site have the same taxable base as Petitioner (the "sales price" of the concrete components). Petitioner does not dispute the fact that both in-state and out-of-state precasters, such as Petitioner, are all required to collect Arkansas sales or use tax based upon the "sales price" of the finished precast concrete components. (R. 117) Therefore, *Chicago Bridge and Iron* is distinguishable from this case.

C. *Similarly Situated Taxpayers.*

Petitioner's argument is conditioned upon the presumption that the precasters who make and sell these components, and sometimes erect them, are in competition with the general contractors who build similar concrete structures on-site using the "poured-in-place" or "tilt-up" method of construction. The whole basis for Petitioner's argument is that the end product is the same. However, there is a fundamental distinction between the precasters and the general contractors.

Petitioner and the other precasters do not compete with the general contractors for the same jobs. Petitioner and the other precasters, in fact, sell to the general contractors.

The general contractors who hire the Petitioner to provide the concrete components are actually the competitors of the general contractors who use the on-site construction methods.

The general contractor makes the business decision of whether to purchase precast concrete components from a precaster, such as Petitioner, or to use one of the on-site construction methods, "poured-in-place" or "tilt-up". Undoubtedly, this decision will have significant tax consequences. Arkansas law clearly requires the contractor to pay sales or use tax on all of the materials used by the contractor. Accordingly, the more the contractor spends on his materials (precast concrete components or sand, gravel and cement) the more tax he pays. Therefore, in the end, it is the general contractor's business decision whether to use precast concrete components or to use one of the on-site construction methods.

The affidavits of two of Petitioner's witnesses, both of which are presidents of companies which produce precast concrete components, explain why a general contractor may choose to use precast concrete components rather than pouring the concrete structure "on-site". Both witnesses stated: "Several of the reasons why our products are chosen is because the concrete can be pre-stressed in our process to make it stronger and the concrete structure can be assembled more quickly 'on-site', thus saving overall construction time." (R. 230 and 234) Based upon the strength and the time considerations, in some cases the general contractor might be instructed to use precast concrete components rather than to pour the concrete structure "on-site".

The Arkansas Supreme Court correctly found that Petitioner, an out-of-state producer of precast concrete components, is more "similarly situated" to the in-state producers of precast concrete components than to the in-state general contractors. Finding that there was no violation

of the Commerce Clause the Court stated:

> The sales and use taxes at issue are not imposed in a way that creates an inequity between in-state and out-of-state taxpayers. The residence of the precast company has no bearing upon the amount of taxes it pays. The Revenue Division imposes both sales and use taxes upon the price of the concrete components regardless of whether they are precast within or without the state. Thus there is equal treatment for similarly situated in-state and out-of-state taxpayers in the imposition of taxes, and as a result, there is no violation of the commerce clause. (Pet. A. 11a)

This decision conforms with the requirements of the Commerce Clause and does not conflict with any decision of this Court or any decision of the other state appellate courts. Therefore this petition for a Writ of Certiorari should be denied.

II.

THE ARKANSAS SUPREME COURT CORRECTLY HELD THAT THE CLASSIFICATION OF PRODUCERS OF PRECAST CONCRETE COMPONENTS AS VENDORS AND THE CLASSIFICATION OF GENERAL CONTRACTORS AS CONSUMERS FOR TAX PURPOSES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE U. S. CONSTITUTION.

The Fourteenth Amendment of the U.S. Constitution permits the states to classify taxpayers for tax purposes, provided that there is a "rational basis" for the classifications. Petitioner readily admits:

> These classifications will be presumed constitutional and

> approved if the legislative action advances a legitimate state purpose and the resulting classifications are reasonably related to the state purpose; the classifications do not have to be drawn with mathematical precision; and, finally, a heavy burden of proof is placed upon the challenging taxpayer to establish that the questioned classifications are palpably arbitrary and do not advance a legitimate state purpose. See *Allegheny Pittsburg Coal Company v. County Commissioner*, 488 U.S. 336 (1989); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Madden v. Kentucky*, 309 U.S. 83 (1940); and *Carmichael v. Southern Coal Company*, 301 U.S. 532 (1937). (Pet. 24)

For Arkansas sales and use tax purposes taxpayers are classified based upon their status either as a vendor or consumer. Petitioner and other precasters are considered vendors of tangible personal property, i.e. precast concrete components. General contractors are considered consumers of construction materials, i.e. precast concrete components or sand, gravel and cement. The question is whether this is a reasonable classification.

Precasters, such as Petitioner, are classified as vendors because they produce and sell precast concrete components, "tangible personal property." Although the precasters in some instances erect these concrete components for the contractor/consumer, that does not negate the fact that there has been a sale of tangible personal property. Precasters are supplying raw material in the form of precast concrete components to the contractor. Robert T. Dolson, Vice-President of Finance for Featherlite Precast Corporation (Petitioner), attested to this fact in his affidavit stating: ". . . Featherlite acts in the role of a supplier of raw materials to the subcontractor or the general contractor." (R. 266)

Mr. Dolson's statement endorses the classification of Petitioner as a vendor. However, Mr. Dolson's statement contradicts the representation by Petitioner in the Statement of Facts that "Neither Featherlite nor the other precasters made any sales of raw materials (e.g. building supplies) to the general contractors. . . ." (Pet. 6)

General contractors are deemed to be consumers or users of all tangible personal property used or consumed in construction. Ark. Code Ann. §26-52-103(9). As consumers, general contractors are required to pay tax based upon the "sales price" of items purchased. If a general contractor purchases precast concrete components, tax is due based upon the total price paid for the components, regardless of whether he or a subcontractor erects those components.

Neither Petitioner nor other precasters competes with the general contractors. The general contractors bid against each other for the construction contract. Whereas, Petitioner bids against the other precasters for the contract to provide the general contractors with precast concrete components. There is no competition between the precasters and the general contractors, even when the precaster is bidding to erect the precast concrete components, because the precasters' bids are submitted to the contractor and the contractors' bids are submitted to the property owner, the ultimate consumer. The precasters and the general contractors operate on two different market levels.

The State has a legitimate interest in the collection of taxes. All precasters, whether in-state or out-of-state, are classified as vendors and taxed identically. All general contractors, whether in-state or out-of-state, are classified as consumers and taxed identically. This application of the sales and use tax laws based upon their status as either vendor or consumer affords both the precasters and the contractors

equal protection under the law, as guaranteed by the Fourteenth Amendment of the U.S. Constitution. Therefore, Respondents respectfully submit that this Court should deny the Petition for a Writ of Certiorari.

CONCLUSION

For the reasons stated above, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 91-1974

In the Supreme Court of the United States

OCTOBER TERM, 1991

FEATHERLITE PRECAST CORPORATION,
PETITIONER

v.

JAMES C. PLEDGER, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS, and JIMMIE LOU FISHER LUMPKIN, Treasurer of the STATE OF ARKANSAS
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR THE PETITIONER

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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

REPLY BRIEF FOR THE PETITIONER

Respondents argue essentially one point in their Brief in Opposition to support the Arkansas Supreme Court's decision below: i.e. Featherlite Precast Corporation ("Featherlite") was a manufacturer/materialman retailer that produced and sold components (tangible personal property) of large concrete structures to general contractors, and then, additionally, subcontracted erection services on the job sites. This is a factual mischaracterization by Respondent that is *not* supported by the stipulated evidentiary record nor the applicable Arkansas Sales and Use Tax statutes.

Featherlite was a fully licensed building contractor for heavy buildings during all of the years in suit. Featherlite per-

formed the same contracting or building services (utilizing the "precast" method of construction), under "lump sum contracts," as would any general contractor or specialty subcontractor who erected the large one-of-a-kind specially designed and engineered concrete structures by pouring the components of the structures "in place" on the Arkansas job sites. Thus, Featherlite and these other contractors were "similarly situated" competitors for Arkansas Sales and Use Tax purposes.

The Respondent's mischaracterization of Featherlite's status and activities in their Brief in Opposition are the issues to which the Petitioner's Reply Brief will be directed.

I. FEATHERLITE, AS A FULLY LICENSED BUILDING CONTRACTOR, IS "SIMILARLY SITUATED" TO GENERAL CONTRACTORS OR SPECIALTY SUBCONTRACTORS WHO CONSTRUCT LARGE CONCRETE STRUCTURES IN ARKANSAS UTILIZING THE "POURED IN PLACE" METHOD OF CONSTRUCTION.

In their Brief in Opposition (Br. Opp. 2-13), the Respondents continually refer to Featherlite as a precaster who (as a vendor) is selling component parts (tangible personal property) of large concrete structures to general contractors *and* sometimes subcontracting to also erect these structures on the Arkansas job sites. Respondents continually refer to the taxable base in dispute as the "sales price" of the component parts of the large concrete structure. The Petitioner submits that this is a blatant mischaracterization of the factual record stipulated in this case and one that may mislead the members of this Court in their review of the constitutional issues raised by Featherlite's Petition for Certiorari.

a. Similarly Situated Taxpayers. As noted in the Petition for Certiorari (Pet. 2-10), during the entire period in suit, Featherlite was a building contractor licensed by the Arkansas Contractors Licensing Board to engage in the construction of heavy

buildings (R. 210–216). Featherlite entered into standard "lump sum" subcontracts with general contractors to provide concrete structures erected and affixed to real estate on Arkansas job sites (R. 291–296). For all of the construction jobs questioned in this suit, Featherlite did *not* enter into contracts to sell tangible personal property to contractors, as a materialman–retailer, *and* then enter into a separate subcontract to erect the structures' components (tangible personal property) on the job sites.

Indeed, Featherlite's Vice–President and the representatives of the other two precasters all stated in their stipulated affidavits that: (1) the components of the large concrete structures were unique and specially designed for each construction job; (2) the components were not held as inventory items (i.e. general building materials); (3) there was no difference between the "off–site" and "on–site" casting activities of the precaster/contractor and the general or specialty subcontractor; and (4) solely because of the Arkansas DF&A's "administrative practice," contractors utilizing the "precast" method of construction were put at a substantial competitive pricing disadvantage when compared with their on–site general contractor or specialty subcontractor competitors who poured the same concrete structures "in place." (Dolson Affidavit, ¶ 7 (R. 268); McConnell Affidavit, ¶s 2, 3, 6 and 7 (230–231); and Berglund Affidavit, ¶s 2, 3, 6 and 7, R. 234–235)). [1]

The standard subcontract between Featherlite (the subcontractor) and Pickens–Bond Construction Company (the general contractor) that was stipulated into evidence by the parties for illustrative purposes (Stip. Ex. 1–E) (R. 291–296)), was a standard

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[1] The Respondent's reference (Br. Opp. p. 12) to Mr. Dolson's statement that "Featherlite acts in the role of a supplier of raw materials to the subcontractor or the general contractor" (R. 266). This is again a mischaracterization taken out of context. Mr. Dolson was not referring to the sale of "raw building materials" (sand, gravel, cement, reinforcing steel, etc.), but, in the context of his affidavit, he was describing how this precaster was treated by the other taxing jurisdictions in which the company operated, when Featherlite did not erect the structure on the job site.

preprinted "lump sum" subcontract wherein Featherlite agreed to provide an eight story parking deck erected on the job site in Little Rock, Arkansas, for a total consideration of $1,894,300.00. There is absolutely no breakdown in this illustrative "lump sum" subcontract for Featherlite's sale of (1) components, (2) hauling expenses, or (3) erection charges. Instead, like any subcontract entered into by a general construction contractor with a specialty cement subcontractor who would undertake the obligation to pour the components of the concrete parking deck "in place" on the Arkansas job site, Featherlite, as a licensed building contractor, agreed to provide a large concrete structure affixed to real property on the Arkansas job sites in return for a "lump sum" payment. In either instance, the general contractor had to complete detail work on the structure.

Therefore, Featherlite submits that it was acting as an Arkansas licensed contractor of heavy buildings, *not* as a materialman–retailer selling separate component parts for the concrete structures to a general contractor and then separately agreeing to erect the structure on the Arkansas job sites. The evidentiary record in this case clearly establishes that Featherlite, as a subcontractor working on the Arkansas job sites, was subjected to Arkansas' Use Tax in an amount that was 400% greater than would have been imposed upon a general contractor or a specialty subcontractor constructing the same concrete structure utilizing only the more traditional "poured in place" method of construction. Accordingly, Featherlite submits that the Respondents mislead the members of this Court in their Brief in Opposition by continually referring to the company as a precaster selling component parts and then separately subcontracting to perform construction services on the Arkansas job sites, when the factual record provides otherwise.[2]

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[2] In paragraph 16 of the Stipulation (R. 200), the Respondents stipulated with the Petitioner that the large parking deck which Featherlite produced and erected on the Arkansas job site, was a concrete structure that —

> was precast in Featherlite's plant in Memphis, Tennessee, and erected by Featherlite "on-site" at the Sixth Street location in

b. Legislatively Mandated Equality. As noted in the Petition for Certiorari (Pet. 9–10, 17–19), the Arkansas General Assembly has clearly evidenced its intention that similarly situated contractors, who utilized either the "on–site" or "off–site" methods of construction, should be treated exactly the same for Sales and Use Tax purposes. For Sales Tax purposes, Ark. Stat. Ann. § 26–52–103(9) and § 26–52–307 both state that a contractor is to be deemed the consumer of tangible personal property purchased for use in construction projects, and that such purchases are *not* sales for resale. Similarly, for Arkansas Use Tax purposes, Ark. Code Ann. § 26–53–201 and § 26–53–203(a)(1) make it clear that *all* contractors are to be deemed the consumers of the tangible personal property they purchase for use in these construction projects and that such purchases are to be subject to Arkansas' Use Tax. [3]

Though Featherlite was, during each of the periods in suit, a contractor licensed by the State to construct heavy buildings in Arkansas, the Arkansas DF&A's challenged "administrative prac–

Little Rock, Arkansas. Featherlite acted as a subcontractor of the General Contractor, Pickens–Bond Construction Company on this construction project.

In each of the 18 instances where Featherlite acted as a subcontractor that produced and erected concrete structures on Arkansas job sites during the periods in suit, the company acted as a subcontractor to a general contractor (Stip. Ex. 2–I (R. 218)), not as a mere materialman. However, in the 18 instances in which Featherlite produced, but did not erect, the concrete structure on the Arkansas job sites, in at least seven (7) of these instances, Featherlite contracted only with the property developer (e.g. International Paper Company, the State of Arkansas (Arkansas Department of Corrections), or the U.S. Department of the Army), and there was no general contractor involved. Thus, the Petitioner submits that precasters are also competitors of general contractors, since the precaster performed these same construction services "off site" for the property developer itself, who then arranged for the final erection of the concrete structure on the Arkansas job site (R. 219).

[3] See the full text of these Sales Tax and Use Tax statutes as set forth in Appendix G, *infra*, p. 51a.

tice" and the Arkansas Supreme Court's decision in this case ignore both this fact and the legislative mandate that *all* contractors are to be treated the same for Sales and Use Tax purposes. The Arkansas Supreme Court's holding that Featherlite acted in two distinct and separate capacities, (1) as a producer-vendor and (2) as a producer-subcontractor (308 Ark. 134-135), is a clearly erroneous finding. This mistaken characterization or classification by both the Arkansas DF&A and the Arkansas Supreme Court was based solely upon the Arkansas Supreme Court's prior creation of a "legal abstraction" in its decision in *Republic Steel Corporation v. McCastlain*, 240 Ark. 979, 403 S.W. 90 (1966). Featherlite was "deemed" by the Arkansas Supreme Court to have made a "fictional sale," as a manufacturer, to itself, as a subcontractor, simply because the company sometimes made sales of one of a kind concrete structures without also erecting the components on the Arkansas job sites.

This erroneous determination by the Arkansas Supreme Court has resulted in an assessment of Use Tax against Featherlite in an amount that is 400% greater than the amounts of Use Tax or Sales Tax that would have been assessed against similarly situated contractor-competitors who used the traditional "poured in place" methods of constructing the same concrete structures. These applications of the Commerce Clause and the Equal Protection Clause by the Arkansas Supreme Court do not meet the standards of equality set by this Court's prior decisions (*Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) and *Williams v. Vermont*, 472 U.S. 14 (1985)) for the treatment of "similarly situated" taxpayers. The decision here by the Arkansas Supreme Court is also in direct conflict with the decisions of the appellate courts of its sister states that have considered similar questions involving building contractors who prefabricate a part of the structure "off site" and then complete the structure by attaching it to real

property on the job site. [4] It is most interesting to note that the Respondents have not (and the Petitioner submits cannot) cite a decision by another state appellate court that has sustained the rationale of their "administrative practice" that is challenged here.

II. FOR EITHER COMMERCE CLAUSE PURPOSES OR EQUAL PROTECTION PURPOSES, A CONTRACTOR UTILIZING THE "PRECAST" METHOD OF CONSTRUCTION MUST BE TREATED THE SAME, FOR SALES AND USE TAX PURPOSES, AS A CONTRACTOR USING THE "POURED IN PLACE" METHOD OF CONSTRUCTION.

The Respondents argue (Br. Opp. 3, 9–11) that the Arkansas DF&A's "administrative practice" challenged by Featherlite in this proceeding meets all of the requirements of the Commerce Clause and the Equal Protection Clause because all "precasters" (whether their plants are located within or without the State of Arkansas) are treated the same for Sales and Use Tax purposes, and all general contractors (whether located within or without the State of Arkansas) are treated the same for Sales and Use Tax purposes. As noted in Featherlite's original Petition (Pet. 18–19), Petitioner submits that this "myopic" view of "similarly situated" competitor–contractors by the Arkansas DF&A and the Arkansas Supreme Court is *not* supported by the evidentiary record and was not one intended by any proper interpretation of a legislative act adopted by the Arkansas General Assembly.

Both the Arkansas DF&A and the Arkansas Supreme Court treat Featherlite and all other precasters as mere materialmen–retailers who are supplying only building materials to contractors, because the precasters do not always erect the unique concrete

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[4] *Chicago Bridge & Iron Co. v. Cocreham*, 317 So.2d 605 (La., 1975); *Chicago Bridge & Iron Co. v. Johnson*, 119 P.2d 945 (Cal. 1941); and *Hawes v. Ingalls Iron Works Co.*, 159 S.E.2d 434 (Ct. App. 1st Div. Ga., 1968).

structures on the job sites. This presents a situation somewhat akin to the situation faced in many states where fabricator/producers of items, such as custom cabinets, may or may not install the custom made (fabricated) items into the building itself. In such instances, where a sometime retailer also acts as a contractor, most all of the other state taxing jurisdictions have resolved the question of the proper imposition of Sales Taxes and Use Taxes by taxing the value of *only* the raw materials *when the retailer-contractor installs the custom built item in the structure itself.* On the other hand, these states tax the value of the entire custom built item, when the item is sold to the contractor who then does the installation itself.

This was the practical tax treatment given to the costs of construction of large concrete structures by the States of Tennessee, Louisiana and Texas (where Featherlite's plants were located during the period in suit). In fact, Featherlite submits that virtually all but 3 or 4 of the other 37 state taxing jurisdictions that tax *only* the cost of the tangible personal property incorporated into a structure by the contractor (and none of the costs of labor, overhead or profit) would apply this same rationale to contractors or subcontractors who fabricate or precast components of large concrete structures "off site" and then erect them "on-site" by permanently attaching them to the real property under the terms of a "lump sum" subcontract. [5]

This Court has mandated, for both Commerce Clause and Equal Protection Clause purposes, that "equality for purposes of competition and the flow of interstate commerce is measured in terms of dollars and cents, not legal abstractions." *Halliburton Oil*

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[5] See, Appendix F, *infra*, p.51a for a compilation or summary of the treatment of contractor-precasters by the various states that impose their Sales Taxes and Use Taxes upon only the cost of the tangible personal property purchased by a contractor to be incorporated into the construction of an improvement on real property (as opposed to taxing the value of the entire contract price, a practice that has been adopted by eight (8) states).

Well Cementing Co. v. Reily, 373 U.S. 64, 70 (1963) and *Williams v. Vermont*, 472 U.S. 14 (1985). Since the decision here by the Arkansas Supreme Court is the *only* reported decision that sustains such an arbitrary "administrative practice" by a state taxing authority, Featherlite submits that it is of utmost national importance for this Court to grant the Petition for Certiorari in this case, and reverse the decision of the state supreme court, solely for the purpose of protecting the integrity of this Court's prior Commerce Clause and Equal Protection Clause decisions on this point.

Featherlite submits that the decisions by the Arkansas Supreme Court in this case and the *Republic Steel* case have made Arkansas an "island unto itself" in the flow of interstate commerce for purposes of both Commerce Clause and Equal Protection jurisprudence. The courts of Arkansas' sister states that have considered similar cases have all consistently held that the contractor who prefabricates a part of the structure "off site," and then completes the entire structure on real property on the actual job site, must be treated, for Sales and Use Tax purposes, the same as the "on-site" contractor who constructs the structure utilizing more traditional methods of construction. See, *Chicago Bridge & Iron Co. v. Cocreham*, 317 So.2d 65 (La., 1975), *Chicago Bridge & Iron v. Johnson*, 119 P.2d 945 (Cal. 1941), *Hawes v. Ingalls Iron Works Co.*, 159 S.E.2d 434 (Ct. App. 1st. Div. Ga., 1968), and *Morton Builders, Inc. v. Bannon*, 1991 W.L. 144510 (Comm. Super., July 24, 1991). [6]

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[6] The only decided cases presenting exactly the same Sales and Use Tax question raised here for precasters of large concrete structures are the unreported decisions of the Court of Common Pleas, Spartanburg County, South Carolina, in the cases of *Tindall Concrete Products, Inc. v. South Carolina Tax Commission*, Docket No. 84-CP-42-13 (April 24, 1985) and *Metromont Materials Corp. v. South Carolina Tax Commission*, Docket No. 84-CP-42-14 (April 24, 1985). In both of these decisions, the South Carolina trial court held that the contractor-precaster must be taxed *only* upon the value of the "raw materials" (sand, gravel, cement, reinforcing steel, etc.) used in the construction of the large concrete structures, in the same manner that the general contractor who poured the components of the concrete structure "on-site" was treated for South Carolina Sales and Use Tax purposes.

The Arkansas DF&A's assertion that "all precasters within the state and without are taxed identically and all contractors within the state and without are taxed identically" (Br. Opp. p. 3) is *not* accurate or correct. Though the state taxing agency's "administrative practice" treats all precasters alike, it treats them *all only* as mere materialmen. When these precasters are performing construction functions as licensed contractors, under "lump sum" subcontracts, the Arkansas DF&A does *not* treat *all* "similarly situated" contractors within and without the state in an identical fashion for Sales and Use Tax purposes. Arkansas DF&A's "administrative practice" imposes Arkansas' Sales Taxes and Use Taxes upon contractor-precasters in an amount that is 400% greater than the excise tax imposed upon the contractor who utilizes the "poured-in-place" method of construction, in violation of the protections afforded Featherlite by both the Commerce Clause and Equal Protection Clause of the Federal Constitution.

CONCLUSION

For the foregoing reasons, the Petitioner submits that its Petition for a Writ of Certiorari to the Arkansas Supreme Court should be granted.

Respectfully submitted,

JULY 23, 1992

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APPENDIX F

State by State Summary of Sales and Use Tax Treatment of Contractor/Precasters

TABLE I

States That Tax Only Tangible Personal Property

There are 37 states and the District of Columbia that impose their Sales Taxes and Use Taxes only upon the cost of raw materials (tangible personal property) consumed by a contractor in the construction of improvements to real property, but do not impose these taxes upon the value of any labor, profit, overhead, or the cost of other construction services.

State	If Precaster, As Contractor, Erects Structure, On-Site Sales or Use Tax on Raw Materials Only	If Precaster Erects Structure, Cost of Hauling Components to Job Site Subject To Sales or Use Tax	Citation of State Authority
Alabama	Yes	No	DOR-Sales and Use Tax Rules B27-011, B27-012, and B27-081.
Arkansas	No	Yes	Pledger v. Featherlite Precast Corp., 823 S.W.2d 852 (1992)

California	Yes	No	Bd. of Equalization, Sales and Use Tax Reg. 1521(c)(3)
Colorado	Yes	No	CRS § 39-26-104(1)(a); DOR Sales and Use Tax Special Regulation For Specific Business, 1 CCR 201-5
Connecticut	No [1]	Yes	CGS § 12-407(8) and Public Acts 5 & 17, Conn. Gen. Assembly, Spec. Sess., May 1992
District of Columbia	Yes	No	D.C. Mun. Reg. Title 9, § 438.5 and .6
Florida	No [2]	No	Sales and Use Tax Rule 12A-1.045; Rule 12A-1.051(2) and (5)
Georgia	Yes	No	GCA § 48-8-63; Reg. 560-12-2-.26; Hawes v. Ingalls Iron Works Co., 159 S.E.2d 434 (Ct. App. 1st Div. Ga., 1968)
Idaho	Yes	No	IDAPA 35.02.09,3 and 3B; Id. St. Tax Comm. Reg. § 13.25
Illinois	Yes	No	86 Ill. Admin. Code, Chapt. I § § 130.415; 130.1940; 130.2075

State	If Precaster, As Contractor, Erects Structure, On-Site Sales or Use Tax on Raw Materials Only	If Precaster Erects Structure, Cost of Hauling Components to Job Site Subject To Sales or Use Tax	Citation of State Authority
Indiana	Perhaps [3]	No	I.C. 6-2.5-4-1; Rule 45 IAC 2.2-4-3(a)
Iowa	Yes	No	Admin. Reg. 701-19.4(422,423) and 19.14; Associated Gen.Contractors v. State Tax Comm., 123 N.W.2d 922 (Ia. 1963)
Kentucky	Yes	No	Reg. 103 KAR 26:070
Louisiana	Yes	No	Chicago Bridge & Iron Co. v. Cocreham, 317 So.2d 605 (La., 1975); Pensacola Construction Co. v. McNamara, 558 So.2d 231 (La., 1990); R.S. 47: 301(10)
Maine	Yes	No	Sales and Use Tax Instruction Bulletins Nos. 4 and 46
Maryland	Yes	No	ACM § 11-101(g) and (i)(2)
Massachusetts	Yes	No	DOR Letter Ruling 87-7

Minnesota	Yes	No	DOR Rule 8130.1200, Subpart 7; DOR Sales Tax Fact Sheet 128
Missouri	Yes	No	Admin. Reg. 12 CSR 10-3.028; 12 CSR 10-3.032; Whelen Engineering Co. v. Director of Revenues, No. RS-83-2404 (AHC 10/14/88)
Nebraska	Yes [4]	No	Neb. Stat. § 77-2702(3)
Nevada	Yes	No	NRC § 372.190-210, NAC 372.101(4), 190, 200, 210
New Jersey	Yes	No	N.J.S.A. § 54:32B - 2(e)(2) and - 8.11
New York	Yes	No	NY State Tax Reg. Title 20, Taxation & Finance, Compensating Use Tax, §531.3(b), § 541.11
North Carolina	Yes	No	N.C. Gen. Stat. § 105-164.3(16)
North Dakota	Yes	No	DOR Letter Ruling, Contractors deemed consumers of property purchase for construction
Ohio	Yes [5]	No	Ohio Rev. Stat. § 5741.01 (G)(1); DOT Rule 5703-9-14

State	If Precaster, As Contractor, Erects Structure, On-Site Sales or Use Tax on Raw Materials Only	If Precaster Erects Structure, Cost of Hauling Components to Job Site Subject To Sales or Use Tax	Citation of State Authority
Oklahoma	No [6]	No	Title 680.5, 1991 Supp. § 1352(c), (D), (I.), § 1362(c)
Pennsylvania	Yes	No	Dept. of Rev. Reg. § § 31.11 -- 31.16; § 54.1
Rhode Island	Yes	No	Div. of Tax Reg. SU 88-33; SU 91-27
South Carolina	Yes	No	SCCA § 12-35-110; Tindall Concrete Products v. South Carolina Tax Commission, Ct. of Comm. Pleas, Spartanburg County, Docket No. 84-CP-42-13, Opinion of April 24, 1985; Metromont Materials Corp. v. South Carolina Tax Commission, Ct. of Common Pleas; Spartanburg County, Docket No. 84-CP-42-14, Opinion of April 24, 1985.
Tennessee	Yes	No	TCA § 67-6-209; Tenn. Sales and Use Tax Rules 1320-5-1.-07 and -.08

Texas	Yes	No	Texas Tax Code § 151.007(a)(3) and § 151-007, Comptroller Rule 3.291
Utah	Yes	No	Utah Code Ann. § § 59-12-102 and 103; Reg. R865-19-588
Vermont	No [7]	No	43 V.S.A. § § 9773 and 9774; 32 V.S.A. § 9701(4)
Virginia	Yes	No	DOR Reg. § § 630-10-27 and 630-10-63
West Virginia	No [8]	No	W. Va. DOR Regs. § § 110-15-112 and 113
Wisconsin	Yes	No	Wis. Stat. § 77.51(2) and (4)(a); Wis. DOR Pub. 207
Wyoming	Yes	No	W.S. § 39-6-601 through 604

[1] Prior to May of 1992, the decision of the Connecticut Superior Court in the case of *Morton Builders, Inc. v. Bannon*, 1991 W.L. 144510 (Conn. Super., July 24, 1991) provided that contractor/fabricators were to be taxed only upon the cost of the raw materials incorporated into the completed structure. Adoption of Public Acts 5 and 17 by the May 1992 Spec. Sess. of the Connecticut Gen. Assbly. now directs that contractor/fabricators will be subject to Connecticut Sales and Use Tax on the entire contract price, whether the fabricator erects the structure or not.

[2] Florida taxes the value of materials fabricated "off-site," but only the value of the raw materials fabricated "on-site."

[3] The Indiana DOR is presently in litigation before the Indiana Tax Court with (1) an asphalt paver and (2) a prefabricated building company over these same issues. The prefabricated building company (Morton Builders, Inc.) alleges there is no Indiana Sales or Use Tax due at all upon the construction of such buildings.

[4] Neb. Stat. § 77-2702 grants a contractor an election to be taxed as a "retailer" or a "contractor." If the contractor elects *not* to be a retailer, the contractor is considered the consumer of the raw materials used in the construction project.

[5] Ohio Rev. Code, § 5741.01(G)(1) grants a manufacturer/contractor an election to be taxed as either. If the election is made to be a contractor, the Ohio Sales or Use Tax is imposed only upon the cost of the raw materials used in the construction project.

[6] Fabricators/contractors are subject to Oklahoma Sales or Use Tax on cost of raw materials only if they are consumers of 100% of product produced. If precaster sells any product produced to other contractors, Oklahoma Sales and Use Tax due on full sale price, as tangible personal property withdrawn from stock.

[7] Fabricators/contractors are subject to Vermont Sales or Use Tax on cost of raw materials only if they are consumers of 100% of product produced. If precaster sells any product produced to other contractors, Vermont Sales and Use Tax due on full sale price, as tangible personal property withdrawn from stock.

[8] West Virginia taxes the value of materials fabricated "off-site," but only the value of the raw materials if fabricated "on-site." West Virginia's DOR regulations differentiate between manufacturer/contractors and retailer/contractors.

TABLE II

STATES THAT TAX THE ENTIRE VALUE OF THE CONTRACT

The eight (8) States of Arizona, Hawaii, Kansas, Michigan, Mississippi, New Mexico, South Dakota and Washington impose an excise tax (e.g. Sales or Use Tax) upon the value of the entire contract price (i.e. tangible personal property, labor, profit, etc.), not just upon the value of the tangible personal property (e.g. raw materials) used to complete a construction contract. In these states, all raw materials are purchased on a tax exempt basis by the contractor or subcontractor.

TABLE III

STATES THAT DO NOT IMPOSE A SALES OR USE TAX

The 5 States of Alaska, Delaware, Montana, New Hampshire and Oregon do not have a Sales or Use Tax, and, therefore, no excise tax is imposed by these states upon the cost or charges for any kind of construction activities.

APPENDIX G
ARKANSAS STATUTORY PROVISIONS

Arkansas Gross Receipts (Sales) Tax Act

26-52-103. Definitions.

(a) The following words and phrases, except where the context clearly indicates a different meaning when used in this act, shall have the following meanings:

* * *

(9) "Consumer" or "user" means the person to whom the taxable sale is made or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies, and equipment used or consumed by them in performing any contract, and the sales of all such property to contractors are taxable sales within the meaning of this act;

26-52-307. Contractors are consumer users.

Sales of service and tangible personal property including materials, supplies, and equipment made to contractors who use them in the performance of any contract are declared to be sales to consumers or users and not sales for resale.

Arkansas Compensating (Use) Tax Act

26-53-201. Definition.

As used in this subchapter, unless the context otherwise requires, "contractors" are consumers of all tangible personal property used or consumed in the performance of a contract in this

state and of all tangible personal property stored for use or upon which the contractor may exercise any right or power in this state.

26-53-203. Tangible personal property procured from without state for use by contractors.

(a)(1) All tangible personal property which is procured from without this state for use, storage, or consumption including machinery, equipment, repair or replacement parts, materials, and supplies used, stored, or consumed by a contractor in the performance of a contract in this state shall be subject to the compensating tax of three percent (3%) of the purchase price as provided by the Arkansas Compensating Tax Act, § 26-53-101 et. seq., or three percent (3%) of its market or book value, whichever is greater, if the property has been subjected to prior use before coming to rest for use, storage, or consumption within this state.

(2) The tax shall be due and payable regardless of whether or not any right, title, or interest in the tangible personal property becomes vested in the contractor.

Supreme Court, U.S.
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No. 91-1974

In the Supreme Court of the United States

OCTOBER TERM, 1991

FEATHERLITE PRECAST CORPORATION,
PETITIONER

v.

JAMES C. PLEDGER, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS, and JIMMIE LOU FISHER LUMPKIN, Treasurer of the STATE OF ARKANSAS
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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JAMES C. PLEDGER, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS, and JIMMIE LOU FISHER LUMPKIN, Treasurer of the STATE OF ARKANSAS
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

The Petitioner files this Supplemental Brief, pursuant to the provisions of Rule 15.7 of the Supreme Court Rules, to bring to the attention of the members of this Court the very recent decision of the Supreme Court of Connecticut in the case of *Morton Buildings, Inc. v. Bannon*, 222 Conn. 49, 607 A.2d 424 (Conn., May 12, 1992). This decision was not discovered by Petitioner's counsel until after the Reply Brief for Petitioners was filed herein on July 23, 1992.

ADDITIONAL STATE SUPREME COURT DECISION IN CONFLICT WITH THE DECISION OF THE ARKANSAS SUPREME COURT IN THE INSTANT CASE

The very recent decision by the Connecticut Supreme Court in *Morton Buildings, Inc. v. Bannon, supra*, involves the issue of the proper treatment (for Connecticut Use Tax purposes) to be given the costs associated with the acquisition and erection of prefabricated "made-to-order" metal buildings by an out-of-state based contractor/prefabricator. The resulting tax effect of this decision by the Connecticut Supreme Court in its *Morton Buildings* case is in direct conflict with the tax result flowing from the Arkansas Supreme Court decision in this *Featherlite* case, [1] as these decisions would be applied to similarly situated contractors.

In fact, the decision by the Connecticut Supreme Court in this *Morton Buildings* case holds that the out-of-state located contractor/prefabricator is *not* subject to *any* Connecticut Use Tax upon the erection of these prefabricated metal buildings in the State of Connecticut, under the terms of its contracts with the in-state purchasers. Thus, the out-of-state located contractor-prefabricator in this *Morton Buildings* case actually has been placed at a competitive pricing advantage over the local Connecticut contractors who construct the same type of metal buildings utilizing traditional "on-site" construction methods.

Though Featherlite submits that the taxing effect that results from this decision by the Connecticut Supreme Court is in direct conflict with the effect of the decision of the Arkansas Supreme Court in this *Featherlite* case, this recent decision by the Connecticut Supreme Court in the *Morton Buildings* case reached exactly the same conclusion that has been reached by either the administrative hearing tribunals, trial courts, or intermediate

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[1] *Pledger v. Featherlite Precast Corporation*, 308 Ark. 124, 823 S.W.2d 852 (Ark., 1992).

appellate courts in four other states where this same Use Tax question was raised by Morton Buildings, Inc. [2]

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[2] Morton Buildings, Inc. of Morton, Illinois, has been successful in securing favorable administrative or judicial determinations from the States of Minnesota, Missouri, New York and Wisconsin, to the effect that the company's activities in constructing "made-to-order" metal buildings on sites in those states do *not* cause the company (i.e. a contractor/prefabricator) to incur *any* state Use Taxes on the value of either the raw materials or the finished components of such metal buildings. See, *Morton Buildings, Inc. v. Commissioner of Revenues*, Minnesota Tax Court, Docket No. 5385 (November 22, 1991), *pending on appeal, Morton Buildings, Inc. v. Commissioner of Revenues*, Minnesota Supreme Court, Docket No. C7-92-82 (Minnesota) (submitted on brief, March,1992); *Morton Buildings, Inc. v. Director of Revenues*, Missouri Administrative Hearings Commission, Docket No. 88-001879RZ (December 8, 1989); *Morton Buildings, Inc. v. Chu*, 126 A.D.2d 828 510 N.Y.S.2d 320 (3rd Dist., 1987), *affirmed*, 70 N.Y.2d 725, 719 N.Y.S.2d 643, 513 N.E.2d 1304 (N.Y. Ct. App., 1987); and *Wisconsin Dept. of Revenue v. Morton Buildings, Inc.*, Dane County Wisconsin Circuit Court, Docket No. 91-CV-3124 (February 10, 1992) (no appeal). Because of these decisions, the States of Minnesota and Connecticut have recently amended their respective Use Tax statutes to legislatively impose their Use Taxes upon the value of the raw materials used in these types of metal buildings when they are erected on the job sites by the out-of-state contractor/prefabricator. These legislative amendments put the out-of-state contractor/prefabricator on the same competitive tax plane, for Use Tax purposes, as the in-state "on-site" contractor is for Sales Tax purposes, when the "on-site" contractor uses the more traditional methods of constructing such metal buildings.

The only decision imposing state Use Taxes on Morton Building, Inc.'s activities of in-state "on-site" erection of the out-of-state prefabricated metal buildings was the administrative decision by the Texas Comptroller of Public Accounts in the matter styled *In Re Morton Buildings, Inc.*, Order of the Comptroller Public Accounts, State of Texas, Hearing No. 26,653 (July 26, 1991). This dispute is now pending on the corporate taxpayer's appeal, as *Morton Buildings, Inc. v. Sharp, et. al.*, Travis County Texas District Court No. 91-13867. However, it must be noted that in this pending Texas proceeding, the State of Texas is attempting to impose Texas' Use Tax *only* upon the value of the raw materials used in the metal buildings, *not* upon the value of the entire structure (i.e. the value including the raw materials, plus the cost of direct construction labor, overhead and profit), as the Arkansas DF&A's "administrative practice" did in this *Featherlite* case.

Featherlite Precast Corporation submits that the question of the proper (i.e. constitutional) method of imposing state Use Taxes upon the activities of contractor/prefabricators (whether involved in the construction of precast concrete structures, prefabricated metal buildings, or other similar structures) is an important issue that is currently pending in a number of taxing jurisdictions. The two questions presented by Featherlite's Petition for Certiorari have never been passed upon directly by a decision of this Court and the Petitioner has shown that the states do not have a uniform method of applying their respective Use Taxes in this type of factual situation. [3] However, the vast majority of these states do utilize the reporting method adopted by Featherlite in this case.

The compliance practice adopted by Morton Buildings, Inc. of either paying Sales Tax or Use Tax to the state in which the company operates its prefabricating plants (based upon the value of the raw materials purchased to make the components for the special order metal buildings), is a practice that is in accord with the rationale of the decision of the Alabama Supreme Court in the case of *Alabama Precast Products, Inc. v. Boswell*, 357 So.2d 985 (Ala., 1978). However, Featherlite feels constrained to again emphasize that the decision of the courts in all of these *Morton Buildings* controversies, and the decisions in all of the cases cited in Featherlite's Petition for Certiorari, involved situations where the states were either attempting to, or were allowed to, impose their excise taxes *only* upon the value of the raw materials purchased by the contractor/prefabricator to be incorporated into the erected structures. As the Louisiana Supreme Court decided in the case of *Chicago Bridge & Iron v. Cocreham*, 317 So.2d 605 (La., 1975), the applicable state Sales Taxes or Use Taxes are to be imposed *only* upon a tax base composed of the value of the raw materials utilized by the contractor/prefabricator in the production of the components of the structure that the contractor/prefabricator is obligated to erect on the various job sites. There are no reported

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[3] See the compilation or summary of Use Tax treatment of contractor/ precasters that is set forth in Appendix F of the Reply Brief for the Petitioner.

decisions by any appellate or trial court reviewed by the Petitioner's counsel that imposed a state Sales Tax or Use Tax upon the total value of the completed components (as did the Arkansas Supreme Court in this *Featherlite* decision), so as to put contractor/precasters (i.e. those who utilized the precast/prefabricated methods of construction) at a considerable competitive pricing disadvantage with those similarly situated contractors who utilized the more traditional methods of construction. [4]

The Petitioner submits that the very recent decision by the Connecticut Supreme Court in the *Morton Buildings, Inc.* case, *supra*, represents another decision by the highest appellate court of one of Arkansas' sister states that is in direct conflict with the decision rendered by the Arkansas Supreme Court in this *Featherlite* case. Petitioner further reiterates that there are no reported decisions by any other state supreme courts that have adopted or support the rationale of the Arkansas Supreme Court in this *Featherlite* case.

This Court's granting of the Petition for Certiorari filed in this case by Featherlite would give the members of this Court an opportunity to render a decision that will give much needed guidance to both contractor/prefabricators and the taxing authorities of the various states that impose Sales and Use Taxes upon the construction of buildings or structures where the newer methods of precasting or prefabricating the components of these structures are

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[4] See specifically, the decisions of the Court of Common Pleas of Spartanbarg County, South Carolina, in the cases of *Tindall Concrete Products, Inc. v. South Carolina Tax Commission*, Docket No. 84–CP–42–13 (April 24, 1985) and *Metromont Materials Corp. v. South Carolina Tax Commission*, Docket No. 84–CP–42–14 (April 24, 1985), for judicial decisions that upheld the Use Tax reporting method for contractor/precasters that was adopted by Featherlite in this controversy. These South Carolina decisions specifically rejected an "administrative practice" adopted by the South Carolina Tax Commission for imposing these excise taxes that was the same as the "administrative practice" adopted by the Arkansas DF&A in this case, which "administrative practice" has been sustained by the Arkansas Supreme Court's decision in this *Featherlite* case.

being utilized by contractors who are actually obligated by contract to erect the structures on the job sites.

CONCLUSION

For these further reasons, the Petitioner submits that its Petition for a Writ of Certiorari to the Arkansas Supreme Court should be granted.

Respectfully submitted,

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